151 U.S. 436

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. ~~1200~~. 784 505

THE CITY OF LINCOLN, PLAINTIFF IN ERROR,

vs.

MARGARET J. POWER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JUNE 6, 1891.

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1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in the circuit court of the United States for said district of Nebraska, within the eighth judicial circuit, at the January, A. D. 1891, term.

Be it remembered that on the 10th day of October, 1890, a petition was filed in the office of the clerk of said circuit court; which said petition is in words and figures following, to wit:

Petition.

In the Circuit Court of the United States, District of Nebraska.

MARGARET J. POWER, Plaintiff,
vs.
THE CITY OF LINCOLN, NEBRASKA.

Now comes the plaintiff and for cause of action against the defendant says that she is a resident and citizen of the city of Dubuque and State of Iowa, and that the defendant is a municipal corporation, being a city of the first class, of the county of Lancaster and State of Nebraska; that the amount involved in this controversy is more than $2,000, exclusive of interest and costs.

Plaintiff, further complaining, says that the defendant is a city of the first class, duly organized and existing under and by virtue of the laws of the State of Nebraska, and as such city has full charge, care, control, and management of the public streets and sidewalks within the limits of said city; that 12th street is a public street of said city, graded, curbed, guttered, and paved and sidewalked by the said defendant; that the said street was, on or about the 31st day of May, 1889, a common and public highway and thoroughfare and open for the use of the public, and that said
2 street and the sidewalks along the same were on said date being used as such by the traveling public; that on the west side of said 12th street, between O and P streets, and along the east side of the north half of lot one (1), in block forty-one (41), city of Lincoln, there is a sidewalk some twenty-five feet in width; that on the 31st day of May, 1889, and for a long time prior thereto said sidewalk was and had been in an imperfect, defective, and dangerous condition, and that the defendant had full notice of the imperfect, defective, and dangerous condition of said sidewalk; that this plaintiff, while going from her place of business on the evening of the 31st day of May, 1889, to her place of residence, which was on North 12th street, and while using ordinary care and prudence and without any carelessness or negligence on her part, stepped into a hole in said sidewalk along the east side of the north half of lot one (1), block forty-one (41), in said city, and was violently thrown to the ground, and by said accident was seriously, dangerously, and permanently injured; that the said injury that was received at said time is of a permanent character, and by reason of said injury so

received at said time and place plaintiff has been confined to her house ever since, and has been rendered unfit and incompetent to attend to her duties and business, and has been obliged to employ physicians, incurring an expenditure for medical attendance in the sum of $200, and has suffered great pain and agony of body and anxiety of mind by reason of said injury, and has been damaged in the sum of ten thousand — dollars ($10,200); that the said defendant had full notice of the existence of said defective condition of said sidewalk and knew the condition that the same was in and had ample time to have repaired it between the time the same became defective and the time of the injury, but failed, neglected, and refused so to repair said sidewalk; that this plaintiff knew nothing of the defective or dangerous condition of said side-
3 walk at the time she received the injury. It being about nine o'clock at night, it was impossible for her to see the defect in said sidewalk.

Wherefore plaintiff prays judgment against the defendant for the sum of ten thousand — dollars ($10,200) and the costs of this action.

MARQUETTE, DEWEESE & HALL,
Att'ys for Plaintiff.

STATE OF NEBRASKA, } ss:
Lancaster County, }

Frank M. Hall, being duly sworn, on his oath says that he is one of the attorneys for the plaintiff in the above-entitled cause; that he has read the foregoing petition, knows the contents thereof, and believes the facts therein set forth to be true; that plaintiff is a non-resident of Lancaster county and the State of Nebraska.

F. M. HALL.

Subscribed in my presence and sworn to before me this 6th day of October, A. D. 1890.

[SEAL.] A. G. GREENLEE,
Notary Public.

Upon the back of said petition appear endorsements in words and figures following, to wit: No. 1390. Circuit court of the U. S., district of Nebraska. Margaret J. Power, plaintiff, *vs.* City of Lincoln, Nebraska, def't. Petition. Filed Oct. 10, 1890. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 5th day of November, 1890, answer was filed in said case; which said answer is in words and figures following, to wit:

4 *Answer.*

In the Circuit Court of the United States, District of Nebraska.

MARGARET J. POWER, Plaintiff,
vs.
THE CITY OF LINCOLN, NEBRASKA, Def't.

Comes now the defendant and for answer to the petition of the plaintiff filed herein admits that the defendant is a city of the first

class, as therein alleged by plaintiff; admits that 12th street is a public street of the city of Lincoln; admits that it is graded, curbed, guttered, paved, and sidewalked; admits that on the west side of said 12th street, between O and P streets, along and on the east side of the north half of lot one (1), in block forty-one (41), there is a sidewalk some twenty-five feet in width.

But this defendant denies that on the 31st day of May, 1889, and for a long time prior thereto the said sidewalk was and had been in a dangerous and defective condition; denies that defendant had full notice of the said defective and dangerous condition of said walk; denies that plaintiff was injured while in the due exercise of ordinary care and without fault on her part; denies that plaintiff suffered any injury whatever by reason of the defective and dangerous condition of said sidewalk; denies that plaintiff is a resident or citizen of the State of Iowa, or is a non-resident of the State of Nebraska.

Denies each and every averment of injury and damage in said petition contained; avers that whatever injury plaintiff at the time in said petition alleged received was the result of her own carelessness and negligence and was not the fault of this defendant; denies that the injury received, if any, were or are as alleged in said petition; denies that said defendant constructed said sidewalk or that defendant is bound to keep the same in safe condition or good repair.

Defendant avers that the north half of said lot one (1) is owned by one Morris E. Jones, a resident of the city of Lincoln; that by the act of the legislature of the State of Nebraska governing cities of the first class it is made the duty of all real-estate owners to keep the sidewalk along their property or in front of the same in good repair, and they are by said act made liable for all damages or injuries occasioned by reason of the defective condition of any such sidewalk; that said act was in force at the time the plaintiff's alleged injury occurred, and it was the duty of the said Morris E. Jones to keep said sidewalk in good repair.

That said Morris E. Jones, this defendant avers, is solely responsible for any damages sustained by plaintiff by reason of the defective condition of said sidewalk and is the only proper party defendant to this action and should be substituted for this defendant, The City of Lincoln; that an alias summons be issued for said Morris E. Jones, and this defendant go hence without day.

Wherefore this defendant asks that said Morris E. Jones be made a party to this action and subsituted for this defendent, The City of Lincoln; that an alias summons be issued for said Morris E. Jones, and that defendant be permitted to go hence without day and recover its costs herein.

THE CITY OF LINCOLN, *Defendant*,
By E. P. HOLMES, *City Attorney*.

STATE OF NEBRASKA, } ss.
Lancaster County, }

R. B. Graham, being first duly sworn, upon his oath says: I am the duly elected, qualified, and acting mayor of the city of Lincoln, and have read the foregoing answer, and the facts therein stated are true, as I believe.

R. B. GRAHAM.

6 Subscribed in my presence and sworn to before me this 29th day of October, A. D. 1890.

[SEAL.] EDWIN M. LAMB,
Notary Public.

To the clerk of the circuit court:

Please issue an alias summons for Morris E. Jones, indorsing thereon the sum of $10,200, amount claimed by the plaintiff as damages, returnable according to law.

E. P. HOLMES,
Attorney for the City of Lincoln.

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 1390. In the circuit court of the United States, district of Nebraska. Margaret J. Power, plaintiff, *vs.* The City of Lincoln, def't. Answer. Filed Nov. 5, 1890. Elmer D. Frank, clerk. E. P. Holmes, attorney for the City of Lincoln.

Thereupon, afterwards, to wit, on the 22nd day of November, 1890, reply was filed in said case; which said reply is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

MARGARET J. POWER, Plaintiff,
vs.
CITY OF LINCOLN, Defendant. } Reply.

Now comes the plaintiff, Margaret J. Power, and, for reply to the defendant's answer herein, denies that the injury received by the plaintiff, of which she complains in her petition, was the result of her own carelessness or negligence; denies that the said Morris E. Jones is solely responsible for the damages sustained by the plaintiff by reason of the defective condition of said sidewalk, and denies that he is the only proper party defendant to this action, and denies that he should be substituted for and in the place of the City of Lincoln. Plaintiff admits that Morris E. Jones was the
7 owner of the north half of said lot one (1), in block forty-one (41), in the city of Lincoln, but alleges the fact to be that it was the duty of The City of Lincoln, defendant herein, to keep said sidewalk in good repair and in a safe condition; that the same was under the control and supervision of said City of Lincoln.

Plaintiff therefore prays judgment as she has done in her petition.

MARQUETT, DEWEESE & HALL,
Att'ys for Plaintiff.

STATE OF NEBRASKA, } ss:
Lancaster County, }

F. M. Hall, being duly sworn, says that he is one of the attorneys of record for the plaintiff in the above-entitled cause of action, which said plaintiff is a non-resident of the State of Nebraska; that affiant has read the foregoing reply, knows the contents thereof, and believes the facts therein set forth are true.

F. M. HALL.

Subscribed in my presence and sworn to before me this 21 day of November, A. D. 1890.

[SEAL.] A. G. GREENLEE,
Notary Public.

Upon the back of said reply appear endorsements in words and figures following, to wit: No. 1390. Circuit court of the United States, district of Nebraska. Margaret J. Power, plaintiff, *vs.* City of Lincoln, Nebraska, def't. Reply. Filed Nov. 22, 1890. Elmer D. Frank, clerk. Marquett, Deweese & Hall, att'ys for pl'ff.

Thereupon, afterwards, to wit, at the January term of said court, on the 15th day of January, 1891, the following proceedings were had and done in said cause, as appears of record on folio 279, Journal "P" of said court, to wit:

MARGARET J. POWER
vs.
THE CITY OF LINCOLN. } 1390. Trial.

8 Now come the parties hereto, by their attorneys; also come the following-named persons as jurors, to wit: 1, Peter Kimmerling; 2, Jacob Leopold; 3, Clark Stewart; 4, Peter Brown; 5, J. R. Campbell; 6, Geo. J. McArthur; 7, Lew Franklin; 8, Uriah Welton; 9, G. H. Fitch; 10, Martin Werner; 11, D. N. Johnson; 12, E. J. Holdbrook, who were duly empaneled and sworn according to law; and thereupon, after hearing the evidence in part, the time having arrived for the adjournment of the court and the trial of this cause not being finished, the same was continued until ten o'clock to-morrow morning.

Thereupon, afterwards, to wit, at the said January term of said court, on the 16 and 17th days of January, the following proceedings were had and done in said cause, as appears of record on folios 281 and 282, Journal "P" of said court, to wit:

MARGARET J. POWER
vs.
THE CITY OF LINCOLN. } 1390.

On this day again come the parties hereto, by their attorneys; also come the jury empaneled and sworn herein; said jury heard further evidence, and the time having arrived for the adjournment

of the court and the trial of this cause not being finished, the same was continued until to-morrow morning at ten o'clock.

MARGARET J. POWER
vs.
THE CITY OF LINCOLN. } Cause Submitted to Jury.

On this day again come the parties hereto, by their attorneys; also come the jury empaneled and sworn herein; said jury, after having heard the remaining evidence, the argument of counsel, and charge of the court, retire to their room under the charge of a bailiff, duly sworn, for deliberation, both parties agreeing in open court to have said jury seal their verdict, then to separate,
9 the said verdict to be handed to the judge and opened in the absence of said jury.

Thereupon, afterwards, to wit, at the said January term of said court, and on the 19th day of January, 1891, the following proceedings were had and done in said cause, as appears of record on folios 289 & 290, Journal "P," of said court, to wit:

In U. S. Court, Dist. of Neb.

MARGARET J. POWER
vs.
THE CITY OF LINCOLN. } Verdict.

We, the jury duly empaneled and sworn to try the issues in the above-entitled cause, do find for the plaintiff and assess the amount of her recovery at the sum of fifty-seven hundred dollars.

D. N. JOHNSON, *Foreman.*
GEORGE J. McARTHUR.
MARTIN WERNER.
E. J. HOLDBROOK.
LEW. FRANKLIN.
PETER KIMMERLING.
J. B. LEOPOLD.
CLARK STEWART.
PETER BROWN.
JOHN R. CAMPBELL.
URI. WELTON.
G. H. FITCH.

MARGARET J. POWER
vs.
THE CITY OF LINCOLN, NEBRASKA. } 139 O. Judgment on Verdict.

The jury in this action having on this day rendered a verdict for the plaintiff and against the defendant and assessed the plaintiff's damages at the sum of fifty-seven hundred dollars, on motion of said plaintiff, by Marquett, Deweese & Hall, her attorneys, it is considered, ordered, and adjudged by the court that the plaintiff is entitled to judgment on said verdict, and that said plaintiff, Margaret J. Power, have and recover of and from said defendant, The

City of Lincoln, Nebraska, the sum of five thousand seven hundred dollars ($5,700.00), together with $— costs herein expended.

10 Thereupon, afterwards, to wit, on the 21st day of January, 1891, motion for new trial and to set aside judgment was filed in said case; which said motion is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

MARGARET J. POWER, Plaintiff,
vs.
THE CITY OF LINCOLN, Defendant.

Motion for a new trial and to set aside the judgment herein and to make exceptions and objections part of the record herein.

Comes now the said defendant, The City of Lincoln, and moves to set aside the judgment rendered on the verdict and to set aside said verdict and have a new trial herein and objects and excepts to the said verdict and judgment for the reasons following, to wit:

1. The damages are excessive, appearing to have been given under the influence of passion and prejudice, and for too great a sum for the injuries said to have been sustained by the plaintiff.

2. The verdict and the judgment is not sustained by sufficient evidence, and under the evidence given herein said verdict and judgment should be for the defendant.

3. The verdict is contrary to law, errors of law occur-ing at the trial, duly excepted — by the said city.

4. The court erred in excluding the evidence of the said city, to wit, in permitting said claims filed by said plaintiff with said city council to be admitted in evidence against the objections and exceptions of the defendants; also the evidence of Mrs. Gosper. Question. Did you insist on her going to work? Objected to as incompetent; overruled; def't excepted; and of Dr. Jones, was in part excluded, which was excepted to by the defendants, and excluding part of the testimony of witness W. D. Cox also. Question to plaintiff: You know this property had the same privilege you had? Objected as improper; sustained. Who arranged the show cases,
11 windows, or outside space in front of Mrs. Gosper's store? Objected to as improper; sustained. Also questioned witness Rehlander: State whether or not she told you how this accident happened. Objected to as incompetent and hearsay; overruled.

5. The court erred in refusing to give instructions asked by the defendant and numbered as follows, to wit, Nos. one, two, 2½, as follows:

2½. The jury are instructed that under all the evidence and the law in this action the defendant is entitled to your verdict. You will therefore bring in a verdict for the defendant. Refused. E. S. D.

7. The jury are instructed that 48 inches or two feet from the lot line of said building extended out over the street immediately in

front thereof is an area space, and was such at the time the accident is said to have occurred in this action, and it was the duty of the defendant in traveling along said sidewalk, if she saw fit to walk inside of the area space, to exercise greater care, caution, and prudence than walking upon the sidewalk space of said street, and if the jury find from the evidence that the owner of said premises, Doctor Jones, had protected and covered said opening through the sidewalk immediately adjacent to his building, to admit light and air to the basement of his said building, by strong iron grates or bars which were not more than one inch apart and so constructed that the same could be walked upon with safety, and of sufficient strength to hold any reasonable weight that might come upon it at that point, and that some third person wrongfully and without right or authority from the said Doctor Jones or the said City of Lincoln removed said iron grate or took and carried it away, and that the city had no knowledge thereof, then you will find for the defendant. Refused. E. S. D.

9. The court instructs the jury that the plaintiff while walking along the sidewalk at the time she was injured *she* was bound
12 to exercise good, ordinary care and prudence to avoid any injury and not fall or slip into said light or area way. If the companions who were walking with her pushed or crowded her within the area space in front of said building and into said light or area way, then the defendant would not be liable for the injuries received, and if the jury find from the evidence that the plaintiff was pushed or crowded into said light hole by her companions while walking along said sidewalk, then you will find for the defendant. Refused. E. S. D.

12. The court instructs the jury that when an act is done which is unlawful in itself, such as leaving open a dangerous hole in the sidewalk in a public street of a city, over which there is a large amount of travel, which detracts from the safety of travellers, the author will be liable for an injury resulting from the act, although other causes subsequently arising may contribute to the injury. Refused. E. S. D.

All of which defendant duly excepted to at the time.

6. The court erred in giving the instructions to the jury orally upon its own motion as follows, and duly excepted to at the time by the defendant, and especially the introductory part of said oral instructions, and that part relating to Dr. Jones and reference to his collusion with the city of Lincoln, as well as that portion of said oral charge in relation to said notice being served by plaintiff upon defendants, and especially that part of said oral instruction relating to notice to the city of the condition of said sidewalk prior to said injury, as well as that part relating to the area part of the sidewalk; also to that part of said oral instruction relating to the duty of the officers or any of them of the said city or any other city, as well as to the injuries to the plaintiff, whether she was negligent or not or contributed to her supposed permanent injuries, length of her life, the amount of damage she should recover, reference to the Carlisle table. To each and every one and every part of said

13 oral instruction the def't then and now objects and excepts and calls the court's attention thereto as misleading to the jury, as not the law, and prejudicial to the rights of this defendant, to wit:

GENTLEMEN OF THE JURY: In this case we have a bright, pretty, little lady from Iowa arrayed against 55,000 good, wise, prosperous, and virtuous people who occupy and own this city. It would seem on first view that the contest was decidedly unequal, as it perhaps was between little David and the great Goliath. If the plaintiff comes armed with the sling and sword of truth to fight her battle the might and power of the world could not prevail against her.

It is for you to say whether she is thus armed, and it is your right to know and say whether she is truthful in this or not. If law and reason and justice be on her side, then it is the duty of this jury to state that fact and give to her such damages as evidence warrants.

Pretty much all I propose to say is in writing; and what I shall have to give, outside of the instructions asked for by the parties, is for the purpose of laying before you the law, so that you can give it a fair and proper consideration.

In this connection I wish specially to say that before this trial commenced, Dr. Jones, who is said to be the owner of the property in front of which this accident occurred, or those who represent him, came here and asked to be made a party defendant because and for the reason that if the city should be compelled to pay the damages arising from the defective sidewalk, that therefore the city would have an action against Dr. Jones for the damages the city would have to pay. Without careful consideration I thought he ought to be allowed to become a party defendant, so that the city should not go in collusion with the plaintiff. I gave him leave to file an answer and become a party, but he did not see proper to do so; and I said further that if Dr. Jones was interested I would hear his

14 counsel. He did not see fit to file his answer, but is here with his attorneys. Now, as I think and as I should hold, I believe Dr. Jones could not in any manner be held liable for this injury to the plaintiff. So far as Dr. Jones is concerned, as to whether he is liable to the city for any neglect, I should leave that out of the question.

In that connection I desire -o call your attention to a paper that has been introduced in evidence and which purports to be a notice served on the city authorities as the law requires. And I take the notice which is presented, and on which the plaintiff relies and which is the basis of this action, that there is not only a substantial but a liberal compliance, and states all that the law requires before an action is commenced in any court of justice in this State. The only thing that surprises me about it is that it is so technically correct. So far as that question is concerned, it is absolutely at rest. It is good for all purposes.

Upon this city is imposed the duty of opening and repairing streets and keeping them in a safe and proper condition, so that everybody may pass over them with reasonable safety. The same duty is imposed upon the authorities in all cities, and especially in the great

cities like this where the streets are as long, and especially where this accident occurred, where numerous people are passing constantly during the day and night, the duty is to exercise greater care than where streets are away from the principal places of business of the city.

The law authorizes the city authorities to do certain things, and expects and absolutely requires them to do so, and if a person is injured in consequence of a failure to do so the law requires them to perform the only remedy, which is one of damages, and is the one asked for by this plaintiff. You must take into consideration the testimony, the knowledge you have gained upon going to the ground, the place where the accident occurred, and whether the city had knowledge of the fact that the danger existed, and if it had
15 existed *existed* any length of time. The law has vested in certain officers not only the authority but the duty to look after these several streets. There is a street commissioner, or a sidewalk inspector, who was called here to testify, and it is made his duty to look after these streets, and he has a deputy, and it is his duty to look after the condition of the streets. The mayor might be required to do the same thing. But he is the commanding officer, but can require his subordinates to move; require them to do anything. The ordinance has been read where it is the duty of the police officer to look after the streets, and when the fact is discovered that there is a dangerous place it is his duty to report to the proper authorities. It is his duty to look after these things for the safety of the people. The testimony so far as relates to this shows that there was one policeman, who was there, who saw the dangerous place, saw this hole. His attention was specifically called to it; he saw it and repaired or replaced the grating. Now, there is knowledge, actual knowledge, brought to the proper authorities of the city whose duty it is to look after it.

Now, so far as this question is concerned the city had actual notice, no constructive notice, about it. The police officer has knowledge of the hole. The law requires the police officer to look after such matters and report the condition. It becomes his duty to see that the dangerous place is made safe. Well, now, was that done? There was actual knowledge to the city because the actual knowledge was brought home to the proper officer. What is an officer's duty under the circumstances? Can that officer wait; can he put off from day to day, from time to time, and not repair the dangerous place and make it safe? Cannot do that.

It is his duty to make it safe when he knows that it is unsafe and the place is dangerous. It is his duty to guard against the danger. It is his duty to make it safe, so that the children, whom we are bound to protect, may not be injured. Did he do that?
16 I admit the testimony is diverse as to the time *the time* the damage existed. But did it exist long before the officer had knowledge, or did it exist after the officer had knowledge and until the accident occurred? Now, if you are satisfied on that part of the testimony, and you find that the plaintiff was not negligent in walking on that part of the walk, and the defendant knew of the

defect and permitted it to remain so that the plaintiff was injured, you will find for the plaintiff and that the city was guilty of negligence. I had an opportunity to view the place. It occurs to me where a sidewalk is twenty foot wide it is just as proper to use one part as well as the center where a city describes a sidewalk; certainly everybody has a right to use the whole walk.

Was the plaintiff guilty of any contributory negligence that resulted in the injury to the plaintiff? Whether it was prudent for her to be there? Whether she had any right to be up by the side of the building or not? Where it is all open it seems to me that the public has a right to use the whole of the sidewalk as well as any part. Did she exercise proper care and judgment in passing along there? Did she use ordinary care and prudence in passing there; and, if she had, could she have guarded against this injury that she received? An ordinary person, in the nature of things, walks through a street and cannot look every step they take—cannot look at everything—they look at the windows of the stores, the music stores, or anything of that sort to attract the attention of the observing person. What does an ordinary person do under the circumstances? Consider, apply your own good judgment, good sense. What do persons do under similar circumstances?

Now, if you find that the plaintiff has not contributed to the injury, and you further find that the defendant was guilty of negligence in permitting this hole to remain in the sidewalk, what are you going to do? These are the two questions to direct your inquiry; and if you find the plaintiff is not to blame and the
17 city neglected to do what it ought to have done, then there is one question—the amount of damage the plaintiff ought to receive upon the question of the injury sustained. How are you going to do that? As I have said, among these written instructions take into consideration all the facts and circumstances and see whether it is likely to last her lifetime or how long; whether permanent in its nature or how serious, and take into account all the facts—how much she suffered and how much she is injured and how far she is disabled from earning as much money as before the accident, and how much she will necessarily suffer from the fall and the loss of limb.

Does she have to suffer all her life from that injury?

And whether it will disable her from earning as much as she did before the injury. There is some difference in the testimony. Take and compare the testimony and see the difference in that regard.

Now, with reference to the amount of money the party is entitled to recover from the injury resulting from the accident upon the sidewalk. The balance has not been made fine enough to weigh a single minute of pain. They cannot tell anything about it. No correct idea can be formed by a person who has never suffered from a sprain, so that you cannot form any correct idea of how much pain this plaintiff has suffered by reason of the sprain. I might, if I saw proper, speak from experience; it is not necessary. The doctors have fully testified about the — of receiving such an injury as this sprain. They have told you such a sprain was worse than

a broken bone. Gentlemen, the testimony upon that point is universal; that a broken bone may recover, and that it is possible that that sprain may never get well.

Now, there is no rule to ascertain the money value of the pain she must undergo. How long she has suffered, how intensely she has suffered in the past and how much she is like to suffer in
18 the future is proper for you to consider. The Carlisle tables—new to some of you, no doubt, but some of you have heard of them—they are what we ordinarily use in lawsuits. They show the probable duration of life. It may seem remarkable that a middle aged person should recover more damage than an older person, and a younger person than a middle-aged person. It looks a little rough on the old fellow.

It is the rule; the reason for that—the reason is, where a person has got to live a long while and suffer from day to day, where the pain is the result of the injury received, that person should receive more than the one who must suffer but a year. It is the rule to apply in this case. This individual, according to her statement, is 43. Carlisle in his tables shows that where a person lives to be 43 they are like- to live 25 and a fraction longer—almost 26 years. That result is arrived at after making extended comparisons, inquiries as to the ages, inquiries as to the birth and death of numerous persons, and from which comparisons and investigations they have made up this table. Her average life, according to this table, is almost 26 years. Suppose this plaintiff will live 25 years longer; if you find for her at all you ought to find that she is to suffer from this accident 25 years, and ought to have more damages than if she is to suffer one year. Take into consideration this rule so as to be able to give a requisite and sensible conslusion in the premises.

8. The court erred in permitting the witness T. A. Herdman to testify against def't's objection, to wit: You may state whether or not you had your attention called to this defective or dangerous place during that interval. Objection, leading, suggestive, and incompetent; overruled; excepted to by defendant; and in refusing to permit the defendants (witness) in his cross-examination to answer the question, Had you any right upon those premises by right of your occupancy of the other store-room? The court erred in
19 admitting page 7 of Municipal Code of 1889; also page 24, section 34, of said code; also section 1107, page 313 of said code; also 1109, page 314 of said code, as well as section 1090, page 308 & 309 of said code.

The court erred in refusing to permit the witness W. D. Cox to answer the question, "How large were those pieces of ice?"

9. The court erred in giving the instructions to the said jury in writing offered by the said plaintiff and numbered as follows, which were duly excepted to at the time, to wit: Nos. 1. The jury are instructed that the streets and sidewalks in the city of Lincoln, including the place where the accident is alleged to have happened, were under the absolute control of the city of Lincoln, through its officers and agents, and that it was the duty of said city to keep the sidewalks in question in a safe and suitable condition for people travel-

ing on foot, and for this purpose it was the duty of said city and its officers to keep the said sidewalk free from obstructions and not allow any hole or break in the sidewalk by which a person might be hurt to be left uncovered or open so that an accident might happen; and if the city and it- officers did not observe this rule of law, and that by reason of such failure the plaintiff was injured without fault on her part, then the city is liable in damages for the injury thus sustained. Given. E. S. D.

2. If the jury find in this case that the hole or excavation in the sidewalk where the plaintiff claims to have been injured was by any one or for any reason left open so that the same was dangerous to people passing along the sidewalk, and you further find that one or more of the police officers of said city was notified of the condition and danger of this place before this accident happened, then you are instructed that it was the duty of the city to immediately place such a protection over or around said hole as would make it safe and do away with the danger to people in walking along said sidewalk, and if the city, through its officers, neglected to repair the defect or cover or protect this hole after it knew of its unsafe condition, and the injury resulted to this plaintiff as heretofore stated, then she is entitled to recover from the city the full amount of damages which, in your judgment, she has sustained or will sustain on account of said injury. Given. E. S. D.

4. You are instructed that you have nothing to do with and need not consider the person who was the owner of the property in front of whose premises this excavation was allowed to be exposed.

The question for you to consider is simply whether the city neglected its duty in making and maintaining a safe, suitable sidewalk for persons walking along the same, and sufficiently protecting all holes or traps through which a person might accidentally or innocently fall; and if it did not so its duty in this respect it is liable, regardless of the ownership of the property in front of which the defect existed. Given. E. S. D.

5. The jury are instructed that if you find for the plaintiff in this case, then you will allow her such damages as will fully compensate her for all the pain, suffering, distress, inconvenience, loss of time, and the power to earn money which has resulted or may result to her on account of said injury. In other words, the city is bound to answer to the plaintiff in such damages as will wipe out the existence of the results of said injury so far as it is possible by means of damages in money, and in determining this you will take into consideration and find the evidence that has been introduced (the amount of suffering, pain, distress, inconvenience, and loss of power to labor and earn money that has resulted to the plaintiff or that may result in the future on account of said injury), taking into consideration as detailed in the evidence the probability of the effect of this injury in the future as well as in the past, and allow to her such damages as in your candid judgment you think that she has sustained or will sustain in the future. Given. E. S. D.

Wherefore defendant prays that said judgment and verdict may be set aside and a new trial granted herein, and in default

thereof that defendant'- objections and exceptions, as well as all the instructions, the evidence in this action, as well as all exhibits, may be made a part of the record in this action, and that a bill of exceptions be made herein and a writ of error be granted to said city.

E. P. HOLMES AND
L. C. BURR,
Attorneys for said City of Lincoln.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 139 O. U. S. circuit court, district of Nebraska. Margaret J. Powers, plaintiff, *vs.* The City of Lincoln, defendant. Motion for a new trial and to set aside the judgment herein and to make exceptions and objections part of the record herein. Filed Jan. 21, 1891. Elmer D. Frank, clerk. L. C. Burr & E. P. Holmes, att'ys for the city of Lincoln.

Thereupon, afterwards, to wit, on the 23d day of January, 1891, stipulation was filed in said case; which said stipulation is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

MARGARET POWERS, Plaintiff,
vs.
THE CITY OF LINCOLN, Defendant. } Stipulation.

It is stipulated by the parties hereto that the bill of exceptions in this action shall be allowed and signed by the judge and filed by the clerk as of a day in the January term, 1891, of said court if the same be prepared and submitted to plaintiff's counsel within forty days from this date.

MARQUETT, DEWEESE & HALL,
Attorneys for Plaintiff.
22 E. P. HOLMES & L. C. BURR,
Attorneys for Defendant.

Dated January 22d, 1891.

Upon the back of said stipulation appear endorsements in words and figures following, to wit: No. 139 O. In the circuit court of the U. S., district of Nebr. Margaret Power, plaintiff, *vs.* The City of Lincoln, defendant. Stipulation. Filed Jan. 23, 1891. Elmer D. Frank, clerk. Deweese & Hall, att'ys for plaintiff. Burr, Stearns & Holmes, att'ys for defendant.

Thereupon, afterwards, to wit, at the said January term of said court, on the 19th day of February, 1891, the following proceedings were had and done in said cause, as appears of record on folio 392, Journal " P," of said court, to wit:

MARGARET J. POWER
vs.
THE CITY OF LINCOLN, NEB. } 139 O.

This cause having been heard on the motion of the defendant to set aside the judgment and for a new trial herein, and the court

being fully advised in the premises doth now on this day order and adjudge that said motion be, and the same is hereby, overruled.

Defendant is allowed five days to present bill of exceptions to plaintiff's attorney and plaintiff's attorney to suggest amendments thereto in ten days, at which time said bill of exception shall be presented for signature.

23 Thereupon, afterwards, to wit, on the 2nd day of March' 1891, bill of exceptions was presented for examination and signature of the court and allowed and filed April 13th, 1891; which said bill of exceptions is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska, January Term, 1891.

MARGARET J. POWER, Plaintiff,
vs.
CITY OF LINCOLN, Defendant.

Appearances: Frank M. Hall and J. W. Deweese, for the plaintiff; E. P. Holmes, L. C. Burr, and H. D. Stearns, for the defendant.

Miss MARGARET POWERS, sworn and testifies:

Examined by Mr. HALL:

Q. Are you the plaintiff in this suit?
A. Yes, sir.
Q. Where do you reside?
A. Dubuque, Iowa.
Q. How long have you lived there?
A. About six years.
Q. Where were you on or about the 31st day of May, 1889?
A. In this city; working for Mrs. Gosper.
Q. How long had you been working for Mrs. Gosper?
A. I think I began some time in March.
Q. Of that year?
A. Yes, sir.
Q. What were you doing?
A. I had control of her mil-inery business in the capacity of head clerk.
Q. Where was Mrs. Gosper's place of business?
A. On O street.
Q. Between what cross streets?
A. 11th and 12th.
24 Q. Where was your home?
A. At Mrs. Gosper's house.
Q. And where did she live?
A. At the corner of 12th and R streets.
Q. On which side of 12th street did Mrs. Gosper live?
A. Well, she lived opposite the university; I am not posted as to the points of the compass in this city.

Q. Did Mrs. Gosper live on the same side of 12th street as was her place of business?

A. No, sir.

Q. Her place of business was on one side and her home on the other?

A. Yes, sir.

Q. So that in going from her place of business to her home you have to cross the street?

A. Yes, sir.

Q. How did you go from your home to your place of business?

A. Came from her house to the Burr-block corner up on O street.

Q. Did you always walk?

A. No; we sometimes rode, especially when late to work.

Q. Tell the jury what happened to you on the 31st day of May, 1889, relative to this case.

A. Well, I was returning from work with Mrs. Gosper and Miss Harmon, leaving the store about half-past nine, and coming along the sidewalk near the Transit hotel, on the north side of the Transit hotel, and before we came there, opposite the hotel, there were chairs between the street and the curb, and we naturally kept on the inside of the walk. There was a gentleman standing near the tree; who he was I do not know. We kept near the building and were talking. I happened to be on the inside, and that brought me nearer the edge of the building than I would have been.

25 Q. You may state whether there was an opening in the sidewalk.

A. Yes, sir.

Q. You may state whether there was any covering over the hole at that time.

A. There was nothing over the hole.

Q. What happened?

A. I stepped in with one foot and struck very hard on the toes, bringing down my whole weight on my toes. I was thrown out on the sidewalk and knocked senseless for a moment, and then got up and knew that my foot was injured; put it to the sidewalk, and it had the sensation of a thousand needles, and knew that it was not all right, and wrenched it and twisted it, and I felt that the fore part of my foot was gone. Mrs. Gosper and Miss Harmon assisted me to the street car. I was not able to take a step, and we rode to their house, and they assisted me into the house.

Q. Did the street car run in front of the house?

A. Yes, sir.

Q. What did you do?

A. Sent for Dr. Hart. He came in and ordered hot water and bandages and kept hot water and bandages on, and Mrs. Gosper and Mrs. Graham carried me to my room, and I did not leave it until the following Monday morning.

Q. On what day did you receive this injury?

A. Friday. I did not leave my room until the following Monday morning. My meals were brought to me Saturday and Sunday. Dr. Hart called to see me Saturday morning. I told him I had not

slept any all night on account of the agony with my foot; that I then had a severe headache, and asked him to give me something to relieve me, and he gave me something that made me sleep, and that made my head feel better.

Q. You may state to the jury relative to the pain you have suffered from this injury.

26 A. Well, my suffering was intense.

Q. How long did it continue?

A. Well, for four weeks I was in continued suffering; my engagement was not out until four weeks, and I wanted to fulfill it. Of course, Mrs. Gosper assisted me with my work. She took me in her carriage in the morning to the store and brought me home at night, and I had my dinner and supper served in the store.

Q. How did you get into the store from the carriage?

A. I had a crutch and a cane, and Mrs. Gosper or some one assisted me.

Q. Well, state whether or not you used this foot any at all or made use of it in any way.

A. I could not use it at all.

Q. Now, how long did you stay at Mrs. Gosper's house after the injury?

A. Four weeks.

Q. Where did you go from there?

A. Dubuque, Iowa.

Q. What did you do there?

A. Nothing.

Q. When did you leave?

A. Last September.

Q. Why did you do nothing?

A. I was not able to work.

Q. You may state whether you was under the doctor's care.

A. I was under the care of Dr. Greene, of Dubuque, Iowa.

Q. How long did you continue to walk with a crutch?

A. Until March, 1890.

Q. Have you done any work since you left Mrs. Gosper's?

A. Last September I went to work for D. B. Fisk & Co., in Chicago.

Q. State how you happened to go there.

A. I was in the habit of going there every season.

27 Q. How did you get from your home; how did you get around while there?

A. The street car ran from Madison; I had to walk one-half block; that was about the distance I had to walk on that end of the line, and when I got off I had to walk about the same distance, as near as I can calculate.

Q. Where was your home?

A. With my sister, Mrs. L. Crow.

Q. State from the nature of the position you occupied at D. B. Fisk's you were compelled to use your foot.

A. Not at all. I was taken up in an elevator to the work-room,

so that after I took my place at the work-table I did not have to move. I was supplied with all the material I had to use; did not have to use my foot or exercise any.

Q. Tell the condition of your foot.

A. My foot is very stiff. The trouble seems to be from this part (witness indicates); it is entirely useless, and the upper part of foot is very stiff. The other part (witness indicates) is of no use whatever. The spring seems to be entirely gone. The other part I cannot use. At times it is very painful, especially any change of the weather. I may say a continual pain, more or less, and keeps me in misery, and at times more than at others.

Q. What doctor did you have?

A. Dr. Hart.

Q. Anybody else?

A. Dr. Mitchell called with Dr. Hart at Mrs. Gosper's store.

Q. You may state whether you consulted Doctor Hart with a view to going back to the store.

Objection. Overruled.

A. I asked him if it would injure me in any way to work. He said it might prolong it a little, but said, On the whole, I think it will be as well; that your mind will be occupied. It will not
28 hurt you. You have my permission.

Q. State when it was you had that advise from the doctor, whether prior to going to the store or after.

A. After.

Q. How long after you went to the store?

A. Well, a few days; I don't just remember.

Q. What is your age?

A. I am in my 43rd (forty-third) year.

Q. How long have been in the millinery business?

A. About twenty-five years.

Q. What wages did you receive?

A. Twenty dollars per week.

Q. How long had you been earning that?

A. That is my salary going out time. I have been at work in this way six years?

Q. Have you been earning that money?

A. Yes, sir.

Q. Upon whom are you dependent for support?

A. Myself.

Q. State whether or not you ever had seen this defective sidewalk where you were injured prior to your injury.

A. To my knowledge I had never seen it.

Q. State whether you had been going along that side of the street or the opposite side.

A. On the opposite side.

Q. Now you may state whether or not there was a tree just above, opposite, the place where this defective place in the sidewalk was.

A. I don't think it was directly opposite.

Q. Have you examined that place since the injury?
A. I have not been along there; no, sir.
Q. Do you know about how much space between that tree and the building?
A. Well, no; I cannot say.
29 Q. What employment are you engaged in at this time?
A. Not anything; not since Christmas.

Cross-examined by Mr. BURR:

Q. Miss Powers, where did you reside on the 10th day of October, 1889?
A. I was in Dubuque, I think.
Q. Was you not in Chicago at that time?
A. Not in 1889.
Q. Do you recollect where you were in 1890?
A. I think I was in Chicago. I was in Chicago.
Q. That is, the 10th of last October?
A. Yes, sir.
Q. Was you living there at that time?
A. I was there working at that time.
Q. Were you expecting to stay?
A. If I was able to.
Q. Expecting to make that your home and reside there permanently?
A. No, sir.
Q. How long did you intend to stay?
A. As long as I was able to work.
Q. Then, if you were able to work, all the time?
A. Why, I would stay until the winter season was over.
Q. What was your intention?
A. To come home and take rest.
Q. To come home where?
A. Why, to Dubuque, Iowa.
Q. Then Dubuque, Iowa, was your home and place of residence?
A. Yes, sir.
Q. Did you not go with the intention of staying at Chicago?
A. No, sir.
Q. When was it you say this accident occurred at Lincoln?
A. On the evening of the 31st of May, 1889, about half past
30 nine or between that and ten. I think we left the store at half past nine in the evening.
Q. It is right in front of the Transit hotel where the accident occurred?
A. No, sir; not in front; north of it.
Q. How far from the Transit hotel was it?
A. Now, I cannot answer that question. I cannot give measurements; it is not far.
Q. The Transit hotel and the Jones block join each other, do they not?
A. They tell me so.

Q. On which side of the street was this? Was it on the west side of 12th street? The Burr block across the street is on the east side?

A. Yes, sir; it is, then, on the west side.

Q. How long had you been residing at Mrs. Gosper's?

A. I came there in March.

Q. What time in March?

A. I am not sure about the time.

Q. The early part or the latter part of the month?

A. I think about the middle of the month.

Q. And Mrs. Gosper's store was on O street, on the north side, between 11th & 12th streets?

A. Yes, sir.

Q. How often did you go from your home to the store?

A. Came down in the morning and went home in the evening; did not take any dinner at Mrs. Gosper's; took my dinner and supper at the restaurant near the Windsor—Brown's restaurant.

Q. So you went up and down 12th street twice a day?

A. I think so.

Q. Mrs. Gosper lived about three blocks north of O street, on the east side of 12th street?

A. Yes, sir.

31 Q. Did you know at the time this accident occurred who put the chairs upon the sidewalk?

A. I did not; I supposed they were used by the guests at the hotel.

Q. Did you know who was the owner or tenant?

A. No, sir.

Q. How many chairs were there?

A. I could not tell you that; I noticed several chairs.

Q. More than one?

A. There were chairs.

Q. Were there men sitting in the chairs?

A. One man.

Q. Pleasant, warm evening?

A. Yes, sir; it was a comfortable evening.

Q. And pleasant to sit in these chairs?

A. I should think so.

Q. How wide was the sidewalk?

A. Quite a number of feet.

Q. Twenty-five feet wide?

A. I do not know that it is twenty-five feet wide.

Q. What was the sidewalk made of?

A. Plank.

Q. The boards had good, nice smooth sides?

A. I should judge so.

Q. These chairs sat out how far from the building into the sidewalk?

A. They were between the street and the curb, the outside of the walk.

Q. The curb would be about twenty-five feet from the building and the tree about 8 or 10 feet?

A. Probably.

Q. And these chairs were all between the tree and the outside of the sidewalk?

32 A. Yes, sir.

Q. How many chairs were there?

A. Well, now, I cannot give any number; probably four or five or more.

Q. A dozen?

A. There may have been. There were a good many chairs kept on the street; office chairs, I suppose.

Q. Who was walking with you along the street that evening?

A. Mrs. Gosper and Miss Harmon.

Q. Three of you?

A. Yes, sir.

Q. How were you walking?

A. Three abreast.

Q. A hold of the arm?

A. No, sir.

Q. When you came to these chairs did you still continue to walk three abreast?

A. I think we did.

Q. You was on the inside or west side?

A. I was next the building.

Q. And as they came along they crowded you?

A. It brought me nearer the building than I otherwise would have been.

Q. If you had been walking along you would not have been so near the building?

A. Probably not.

Q. When you were going north how far did it crowd you out of your line as you were going north when you came to these chairs?

A. Really, I could not say.

Q. The chairs was probably 8 or 10 feet from the building?

A. I have not taken measurements.

Q. Cannot you tell how far it swung you over to the west as you came to these chairs in front of that hotel?

33 A. It would be quite a little, of course; I cannot just tell.

Q. Do you know how far from where you got into the sidewalk these chairs were sitting?

A. They could not have been a great distance. This vacant building was joined onto the Transit hotel.

Q. This tree was in front of the hotel?

A. There are several trees.

Q. The trees where the chairs were was in front of the Transit hotel?

A. I cannot say it was right in front. There are several trees. I do not know that one is in front.

Q. Well, do you know how far from the building this open grate reached?

A. Quite a distance.

Q. How far, about?

A. (Witness measures with hands.)

Q. Two or three feet?

A. I think it would measure that. I should think it was about two feet.

Q. What was the shape of this opening—this grate?

A. Half circle.

Q. No grating in there at all?

A. Nothing at all.

Q. Did you see the broken grating there?

A. No, sir.

Q. Did you look for anything?

A. No, sir.

Q. You was injured, and only thought of your injury?

A. I was in great pain, and only thought of my injury.

Q. Was there any lights that cast the light upon the sidewalk?

A. I think the gas was burning at the opposite corner of the block.

34 Q. The corner of the block—the corner of P and 12th or O and 12th?

A. The upper corner of the block.

Q. That would be P street.

A. It would, I guess.

Q. Was the hotel place open?

A. I presume it was; I did not notice.

Q. It was not dark?

A. No, sir.

Q. You could see to walk on the sidewalk?

A. Yes, sir.

Q. When you came up to this place did you see any step or place that went into the hall or building?

A. There are steps that go into the building.

Q. Did you see any steps on the sidewalk that led up to the water table or step-stone that went into the building?

A. I suppose I did; I cannot tell about that; walking along, not thinking of any trouble. Of course, I cannot say as to these steps.

Q. How far south of these steps was this hole you fell into?

A. I am not sure. I have not seen the steps since and cannot calculate. I have only driven by, and so could not say.

Q. Do you know what store was right immediately north of where this accident occurred, in the Jones block?

A. There was a little confectionary store.

Q. Do you know whether they had a light in that store or not?

A. I cannot say; do not recollect.

Q. Well, do you know whether they had any lights on the sidewalk or not?

A. I do not recollect.

Q. Don't you know whether there was or not?
A. I do not.
Q. There was sufficient light to see? You recollect that much.
35 A. I suppose there was.
Q. Did you look down to see where you were stepping at the time you stepped into this hole?
A. I did not or I would not have stepped into the hole.
Q. You were assuming that the walk was all right?
A. Yes, sir?
Q. Did you know that the place near a building—the two-foot space—is dedicated to light and areaways and ventilation?
A. That thought never struck me before.
Q. You have always lived in cities where there were large buildings and accustomed to see light and ventilation holes?
A. Yes, sir.
Q. You knew that fact?
A. Of course if I had thought of it I would have kept out.
Q. Down in front of Mrs. Gosper's store you kept a little show-case. You knew you had a right to that space?
A. Yes, sir.
Q. You knew this property had the same privilege you had?

Objection as improper. Sustained.

Q. Who arranged the show-case window or the outside space at Mrs. Gosper's store?

Objection, improper. Sustained.

Q. When you went up the street north, along 12th street, you never thought in your own mind that you were travelling on the space dedicated to areaways?

Objection as improper. Overruled.

A. No, sir; I supposed I was on the street.
Q. You thought you were out from the areaway space?
A. The areaway did not strike my mind as being in any way dangerous.
Q. Were you talking with Mrs. Gosper and her companion?
A. Yes, sir.
36 Q. Was it an animated conversation?
A. Not particularly so.
Q. At any rate, you did not think of being so close — the building?
A. I did not.
Q. Do you know who put that tree there, or allowed it to be there, or in front of whose property it is?
A. No, sir; I do not know.
Q. You had often seen the trees there before?
A. Yes, sir.
Q. See any chairs there before?
A. Yes, sir.

Q. Did you ever turn out there before?
A. I walked there before, but very seldom; I don't think I walked there more than three times.
Q. Now, the hole was about two feet out into the sidewalk running along the building?
A. I should think three or three and a half feet.
Q. How deep was it?
A. I do not know; but I have heard since it was in the neighborhood of three feet; I know I fell a great distance.
Q. How far did you fall?
A. I fell so that my foot struck hard on the bottom.
Q. Did your foot strike on the side?
A. I went down in and it threw me on the sidewalk.
Q. And it threw you over on the sidewalk?
A. Yes, sir.
Q. Did it bruise the ankle or above the ankle?
A. No, sir.
Q. Just the bottom of the foot?
A. Injured my instep, and I believe the ankle was injured as well.
Q. Do you know which part of the foot struck the ground first?
37 A. My toes. I fell with full force on my toes.
Q. Landed your whole weight on your toes?
A. Yes, sir; and threw me on the sidewalk.
Q. Threw you on the sidewalk?
A. Yes, sir.
Q. The hole was plenty large for your foot to go in and out?
A. Yes, sir.
Q. Do you know how far it is from the top of the sidewalk to the bottom of the hole?
A. In the neighborhood of three feet—between two and one-half and three feet.
Q. So when you fell, did you go to the bottom?
A. I went until I struck something.
Q. Did your hand strike the building?
A. No; I fell out.
Q. Is this your left foor that is hurt?
A. Yes, sir.
Q. You were going north and stepped in on your left foot?
A. Yes, sir.
Q. When did you call a physician to attend this injury?
A. As soon as I got into Mrs. Gosper's house. She went after Dr. Hart. He come in immediately. He lived the second door from Mrs. Gosper's house, and he came in immediately.
Q. What did he prescribe for you?
A. Hot water and bandages.
Q. And you put the hot water on?
A. Yes, sir.
Q. How long did you continue these applications?
A. Until the next day—Saturday.

Q. What did you do then?

A. He gave me medicine to bathe it—a liquid.

38 Q. What day of the week was it that the injury occurred on?

A. Friday evening.

Q. And what did the doctor tell you to do about taking care of the foot?

A. He told me to keep it warm and keep it at rest and at a hight on a level with my body.

Q. To keep it off the floor?

A. I suppose so.

Q. How long did you keep it in that condition?

A. The four weeks I worked for Mrs. Gosper and after I went home. I kept it in that condition or way for about six weeks, as near as I can recollect, most of the time.

Q. Did you keep it that way all the time?

A. No, sir; not all the time.

Q. What was your object in going to Mrs. Gosper's store on the following Monday?

A. To fulfill my contract. Her work was depending on me.

Q. Her work was crowding?

A. Yes, sir; that is the busy season.

Q. You had to attend to your duties there?

A. Yes, sir.

Q. In going down how would you get from your room to the buggy?

A. I came down-stairs with a crutch and cane.

Q. Was your room on the second floor at Mrs. Gosper's?

A. Yes, sir.

Q. You would use a crutch and cane?

A. Yes, sir.

Q. One crutch and one cane?

A. Yes, sir.

Q. That, of course, would let the foot come down?

A. No, sir.

Q. It brought it down so that the blood could rush into it?

A. Yes, sir.

39 Q. You would walk down these stairs, get into the buggy, and walk from the buggy to the store?

A. Yes, sir.

Q. How did you keep your foot while in the buggy?

A. On an elevation level with my body.

Q. What did you do at the store?

A. Trimming hats and bonnets.

Q. Did you carry out your engagement with Mrs. Gosper?

A. I did.

Q. Did Mrs. Gosper make any deduction in your pay?

A. For two weeks I worked for less pay.

Q. How much less?

A. I worked for $18.00 per week.

Q. She allowed you $18.00?
A. It was my own proposition. I felt that I was not quite able to do my duty.
Q. Mrs. Gosper made no complaint?
A. No, sir.
Q. And for four weeks you got less pay?
A. No; for two weeks.
Q. I thought your engagement lasted four weeks.
A. It did, but for two weeks I worked for $18.00 per week.
Q. You deducted from your salary for two weeks?
A. Yes, sir.
Q. And after the first two weeks you could get around better?
A. I deducted for two weeks. It was neither the first nor the last.
Q. You just threw off four dollars for the four weeks?
A. Yes, sir.
Q. In your business, Miss Powers, the busy season was while you was out here?
A. I began the first of February at D. B. Fisk's and came to Mrs. Gosper's the first of March.
Q. You only engaged to stay until the first of July?
A. First of July.
Q. And from the 1st of July to fall it is very dull?
A. Yes, sir.
Q. Now, if your foot had not been hurt from the time you left Mrs. Gosper's until September you would have done nothing?
A. Would not have worked during July and August.
Q. Now, during that time where was you residing?
A. At Dubuque, Iowa.
Q. And what did you do during that time as a business, anything?
A. No, sir.
Q. But what kind of treatment did you give this foot?
A. Dr. Greene, my physician, ordered it showered with hot and cold water alternately three times a day and rubbed with alcohol, and I did that three times a day; that was the treatment.
Q. That all?
A. Yes, sir; that is all.
Q. During that time what did you do yourself?
A. Did not do anything; positively rested; my strength was gone. I was positively not able to do anything.
Q. Well, was that all the treatment you gave your foot?
A. Yes, sir.
Q. How did you walk around?
A. With a crutch and cane.
Q. When was it you went to Chicago?
A. I went there the latter part of August last, and began work the first of September.
Q. And where did you begin work?
A. At D. B. Fisk's wholesale house.

Q. What were your wages?
A. Eighteen dollars per week.
Q. That is the same you had been working for them for all the time?
41 A. No; I had never taken a position of that kind. I was not able to take an outside position as trimmer, as I expected to do. My strength would not allow me to do so.
Q. Suffered no other bodily injury except that of the foot?
A. I think I have. I think my bodily strength is very much shattered. I think the nervous system is affected.
Q. You think it effects the nerves?
A. Yes, sir.
Q. Well, in Chicago you walked down?
A. I took the street car.
Q. On what street car?
A. The Adams street-car line.
Q. How far was it from your house to that street-car line?
A. One-half block.
Q. Did your foot disable you from going to and from the street car?
A. I could not get there without a cane. It disabled me.
Q. Could you bear the ball of your foot down at all?
A. No, sir.
Q. Then you could not let the ball of the foot down?
A. No, sir; I used the heel.
Q. You took one step at a time on this foot?
A. Yes, sir.
Q. You would always have to go up with your right foot?
A. Yes, sir.
Q. First your right foot and then your left foot?
A. Yes, sir.
Q. You stated to the jury you cannot step up into a street car as any one would?
A. No, sir; I cannot. I have to use only my heel.
Q. Because why?
A. I cannot use the fore part of my foot.
42 Q. You cannot use the fore part of that foot at all?
A. No, sir; I cannot.
Q. You can put your foot on the ball of it and turn around or wheel around?
A. No, sir; I cannot.
Q. The fore part is absolutely powerless, is what you want the jury to understand?
A. Yes, sir.
Q. You are sure you cannot turn around on the ball of your foot?
A. Yes, sir; I am sure.
Q. That is what you show in your claim, is it?
A. It is in the same condition.
Q. How long did Dr. Hart continue to prescribe for this foot of yours?
A. While I was here.

Q. For four weeks?
A. Yes, sir.
Q. When was it he told you you might go down to the store?
A. It was two or three days after I had gone. I spoke to him about it.
Q. How many times did he see your foot after the injury?
A. Well, two or three times a week and sometimes oftener.
Q. You got his permission after you had been there some times?
A. I went two or three times.
Q. What did the doctor tell you when he first came to see it?
A. He did not seem to think much of it. He did not think the injury much and told me that it was very slight.
Q. Said so, did he?
A. Yes, sir; and after several days my foot pained me so and I sent for him. I felt uneasy and wanted him to make a more thorough examination.
Q. What did he say then?
43 A. He said, I find that it is a much more serious injury than I first thought. At first I thought you would be able to walk in four or five weeks; now I would not say in five months or six or even a year.
Q. Was ir getting worse?
A. He seemed to think it was.
Q. What did he say the great trouble was?
A. The liganents were severed on the under part of the foot. I have a letter describing the full particulars.
Q. The ligaments were torn. Did he say how they were torn or separated?
A. The great strain from the fall.
Q. Did he say anything about your walking aroun*f* or using it?
A. Yes; he said I must not use it.
Q. You continued to go to *y*he store while hurt?
A. Yes, sir.
Q. And carried on your work?
A. Yes, sir.
Q. While there you kept your foot elevated?
A. Yes, sir.
Q. Was there any inflam-ation in the foot?
A. Yes, sir.
Q. And the inflam-ation did not subside?
A. Not for a long time.
Q. Dr. Hart told you that if you would keep still and not walk with a crutch or cane the inflam-ation would subside and your would get out?
A. No, sir; he did not.
Q. Miss Powers, do you recollect of bringing a suit against the city of Lincoln in the district court of Lancaster county?
A. Yes, sir.
41 Q. Where was you residing at that time?
A. In Lincoln.

Q. When you came to Lincoln how long did you expect to remain?

A. Till the latter part of June.

Q. You did not come here with the intention of becoming a permanent resident of our city?

A. No, sir.

Q. Are you acquainted with Dr. Jones?

A. I met Dr. Jones after the accident.

Q. How long after you was injured was it when you met Dr. Jones?

A. Probably three or four days, Wednesday or Thursday of the following week.

Q. Where was it?

A. In Mrs. Gosper's house.

Q. Did he examine your foot?

A. He looked at it with Dr. Hart.

Q. Did he leave any direction as to your taking care of it after that?

A. He suggested that he would shower it with hot and cold water, and that was done while he and Dr. Hart were there.

Q. Was that all the direction you recollect they gave you?

A. He then spoke of using electricity and suggested it to Dr. Hart. As far as I recollect that was all.

Q. Did he advise you anything about rest and quiet?

A. That was suggested at the first, and I guess I did give it rest and quiet.

Q. Did he say what position to keep the foot in?

A. Dr. Hart did.

Q. Did Dr. Jones at the time he was there?

Objection. Overruled.

A. No, sir.

Q. What did Dr. Jones come for?

45 A. I sent for Dr. Jones to have a talk with him, as I sustained the injury on his property, and the matter was not touched upon while he was there, except that he was telling about this grating being out. He spoke of it being out, but thought he replaced it about ten or twelve days before.

Q. What did Dr. Jones and Dr. Hart say at that time about the position you should keep your foot in?

A. They said to keep it elevated.

Q. And give it entire rest?

A. Yes, sir.

Q. Did they say the only way the ligaments would grow back and fasten to the bone was to give it entire rest?

A. They did not say anything about growing back. Dr. Hart advised me to keep it in this position and keep it warm, and I did so.

Q. Did you use electricity on the foot?

A. No, sir; it was not used.

Q. Why not?

A. He came one afternoon and wanted to know if I was getting along nicely with my foot, and I told him it was not doing as I should like to have it, and wanted to know if I was ready to have the electric battery, and I told him I was in charge of Dr. Hart, and, until I had discharged him, would follow his advise, and he went to Dr. Hart's residence and left a communication there for Dr. Hart to use it.

Q. Did Dr. Hart come?

A. He came that evening.

Q. Did he use the battery?

A. No, sir.

Q. Why not?

A. Dr. Hart did not approve of it, so I did not use it.

Q. Could you have used it yourself?

46 A. I know nothing about it.

Q. Did they explain how to use it?

A. Not to my knowledge.

Redirect by Mr. HALL:

Q. Did you tell Dr. Hart that Dr. Jones had been there?

A. I did.

Q. And what he had left there for him to use?

A. Yes, sir.

Q. What did he say?

—. He laughed and said he had one of his own; he didn't want to use that.

Q. Did he use it?

A. No, sir.

Q. Did Dr. Jones call on you at the store-room of Mrs. Gosper?

A. No, sir.

Q. Whereabouts?

A. At Mrs. Gosper's house.

Q. What did he say to you at this time about the grate being out? Use his language.

A. Well, he spoke of this thing; that he knew nothing about it; spoke in an unconcerned way; that darn thing had been out for some time; could not sit out there and watch it; could not take his bed and lie down out there; that he had put it in ten days before.

Q. Did you ever send for Dr. Jones as a physician?

A. No, sir.

Q. Was you ever under his care?

A. I was not.

Q. You may state whether you remember whether the store in front of which this defective walk was vacant or not.

A. I think it was vacant.

Q. What would you say as to the condition of the street at this place, as to whether it was well lighted or not?

47 A. Well, I suppose it was lighted as usual. I did not notice particularly.

Mr. W. N. RELANDER sworn and testifies:

By HALL:

Q. Mr. Relander, do you live in this city?
A. Yes, sir.
Q. What is your business?
A. Druggist.
Q. Where is your place of business?
A. 11th and O street.
Q. Where do you reside?
A. 1327 O street.
Q. State what street you traverse in going to your residence from your place of business.
A. I go down to O street on 12th.
Q. Which side of 12th?
A. West side of 12th.
Q. And how long have you been in the habit of travelling back and forth from your residence to place of business?
A. Number of years; eight, I guess.
Q. Do you remember, Mr. Relander, of an accident that happened on 12th street, west side, between O and P in May, 1889, to a Miss Power?
A. Not the exact date; I remember an accident.
Q. You may state whether or not you observed the condition of the gratage over the areaway next to the building.
A. I did.
Q. Whereabouts was that in reference to the stairway going into the Jones block?
A. The left as you go up the stairway.
Q. Tell the jury the condition of that areaway and about how long you had noticed it in that condition.
A. Well, I do not know just what condition it was in; the grate must have been down, and there was a tree near there, and I
48 went on the outside for fear of being hurt.
Q. For how long did you notice that?
A. Two or three weeks; maybe only ten days; maybe two weeks.
Q. Was it in that condition usually when you passed—was that the condition you usually found it —?
A. Why, no. I should not have noticed it until it was broken.
Q. Did you state whether or not you had your attention specially called to that defect about the time of this accident or after?
A. Never had my attention called.
Q. State whether you had a conversation relative to it.
A. Yes, sir.
Q. And with who?
A. Mrs. Gosper.
Q. Before or after this accident?
A. A short time after. If you will allow me to state how the conversation started, I was going home——

(Objection. Overruled.)

I called Mrs. Gosper's attention to it on going to supper and told her it was dangerous.

Q. State whether or not she told you how this accident happened.

Objection as improper, incompetent, and hearsay. Overruled. Defendant excepts.

A. She told me about an accident and how it happened.

Q. Now, Mr. Relander, you may state to the jury about how long it was from the first time you saw that hole open until you had the conversation with Mrs. Gosper.

A. About a week or two.

Q. Well, was it open continually during that time?

A. When I noticed it it was.

Q. How many times a day did you pass along there?

A. Well, on the average about four times.

By STEARNS:

Q. You always went on that side of the street?

A. Yes, sir.

49 Q. You spoke about a tree in close proximity. How many feet from the street was it?

A. About six or eight feet. There is a shoot comes out. You must get a little ways from the tree. The limb goes toward the building; about six foot up.

Q. A tall man would have to dodge?

A. Yes, sir.

Q. How far does this grate project from the building?

A. Could not say exactly.

Q. There are some steps going up into the building, are there not?

A. I do not know.

Q. You came along there frequently?

A. I kept away from the steps.

Q. Will you say there are no steps?

A. I could not say.

Q. Is it not a fact that there are two steps that lead into the storeroom that project out two feet into the walk?

A. I do not recollect.

Q. Would that areaway project out beyond a line drawn from step to step?

A. I do not know whether there are any steps or not.

Q. You won't testify whether there is or not?

A. No, sir.

Q. Would you say that areaway had been open consecutively for two weeks?

A. It seems to me longer than that, but I could not say.

Q. Do you know of any repairing in the interim?

A. Only that this grate was put in shortly after this accident; but this I was only told. I do not know.

Q. Now, it might have been on different occasions that this grate was out and repaired in the meantime?

A. It is possible.

50 Q. Any one use that areaway to put ice in the basement?
A. I do not know.
Q. Now, how long was this areaway open after the accident, as you learned?
A. I do not know; it may have been the next day or a week after.
Q. You do not know just how long prior or just how long after?
A. I am impressed it was open two weeks altogether; it may have been a week before and a week after. I do not think it was repaired immediately.
Q. How was that street lighted in the evening about the time of the accident?
A. Well, there is an electric light, but I don't know whether it was going or not.
Q. Is it not a fact that there was a candy stand right in front of this areaway or close to it?
A. Not that block; there is one on O street.
Q. No; but at this block, about the time of the accident?
A. Chevront, I guess, nearly in front, had a candy stand.
Q. Of that confectionary store?
A. I don't remember.
Q. Is it not a fact that there is a light on the same side of the street that was always lighted up at that time?
A. There was an electric light on a post.
Q. Is it not a fact that it was well lighted?
A. I could not say whether it always was or not.
Q. You don't remember definitely?
A. No, sir.

Excused.

51 Mrs. GOSPER sworn and testifies:

By HALL:

Q. Mrs. Gosper, you live in this city?
A. I do.
Q. Are you acquainted with the plaintiff, Miss Powers?
A. Yes, sir.
Q. Where is your place of business?
A. On O street; 1114 O street.
Q. Where is your residence?
A. Corner of R and 12th streets.
Q. What was Miss Power doing for you in the summer of 1889?
A. She had charge of the trimming department in the millinery store.
Q. What wages were you paying her?
A. Twenty dollars per week.
Q. Who sent her to you?
A. D. B. Fisk & Co. I engaged her from their recommendation.
Q. You may state if you remember anything about any accident that happened to Miss Power in May, 1889. You remember about that?
A. I do.

Q. Tell the jury all about that—how it happened.

A. We worked until half past nine in the evening and then left the store to go home; sometimes we had the horse and carriage, but that evening we walked. We went up on the west side of 12th street. I usually went on that side when I walked, for the reason that I sometimes stopped at the meat market, and that evening the ladies were with me and we went on that side of the street. It was not very well lighted. Near the Transit hotel there were some trees standing and we passed on the west of the trees, side by side, three of us. Miss Powers was next to the building, I was next, and Miss Harmon next. When we got *yo* this opening she went down into
that opening and she fell prostrate. A gentleman standing
52 back of us—it was not very light—called out and asked if that lady was hurt or had a fit. She said, I am not in a fit, but I am hurt. We helped her to a street car. I asked her, Shall I get a hack? She said, Perhaps I can walk, but found she could not walk when she tried. I saw the street car coming and we assisted her onto it. I don't think there was any light by that confectionary store. We got her into the car, and when she got home she could not step. After we got out I went for Dr. Hart. He was in bed, but came right over and treated the foot.

Q. What do you know about her suffering while at your place and in your employ with that foot, Mrs. Gosper?

A. She told me; I asked her——

Objection sustained.

I know she suffered intense pain.

Q. How did she seem to suffer after receiving the injury? Did she suffer much pain?

A. She told me in the morning she had not slept any.

Objection as hearsay and incompetent. Overruled. Defendant excepts.

Q. What would you say, from what you observed, as to whether she suffered?

Objected to as hearsay and incompetent. Overruled.

A. I know from her looks and what she told me she must have suffered a great deal.

Q. Mrs. Gosper, you may state whether or not you saw this injured foot after it was injured and along from time to time?

A. I did.

Q. What was its condition?

A. It was swollen, and I would rub it with my hands and try and get warmth into it. I could not dent it by pressing—indeed, I could not press on the foot, because she could not bear it. You cannot dent it at all as the natural foot. It is just as hard as a stone.

53 Q. You mat state whether you heard the plaintiff complain of pains.

A. I certainly did.

Q. How soon did she go to work for you after this accident?

A. Monday morning, though she was not able.

Q. Did you insist on her going to work?

A. No, sir; the work was there and she said Saturday morning, I feel as though I ought to work.

Objection overruled.

Q. Did she go to work Monday morning?

A. Yes, sir.

Q. How did she get back and forth?

A. She went in a carriage. She had a crutch bought for her Monday morning. She did not go down until Monday morning. She was helped upstairs by my son and Miss Harmon.

Q. Did she continue to use that crutch and go to and fro in the carriage during the time she was with you?

A. Yes, sir.

Q. Mrs. Gosper, you may state whether or not you had observed this defect in the sidewalk before that time.

A. Yes, sir.

Q. How long did you notice that prior to the accident?

A. I think about two weeks. I am not positive, but I think as long as that.

Q. How long after this accident did it remain in that condition?

A. I do not know. I went to the meat market and spoke to Mr. Herdman and said it ought to be fixed.

Q. Did you tell him about this accident?

A. I think I did.

Q. Did you have a conversation about it at that time?

A. Yes, sir.

54 Q. What Herdman was that?

A. I cannot tell; it was the one that run the meat market. I think it was George. It was the one that sold me meat every day.

Q. State during the two weeks what was the condition of this walk.

A. I think the grating was out.

Q. How did you happen to notice that?

A. I thought it was a dangerous place.

Q. You may state to the jury how this plaintiff conducted herself in your place of business relative to the using of her foot during the day.

A. She was assisted and helped into the store, and then we fixed her foot on a box so that it was on a level even with her body, and so waited upon her, the different girls bringing her work to her—that is, the girls I had in my employ; but she usually waited upon herself.

Q. Did she continue to treat her foot all the time she worked for you?

A. Yes, sir.

Q. When was it she left your place?

A. On the 4th of July.

Q. How long did she continue to work for you after the accident?

A. From the Monday morning until she went away.

Q. Do you know whose treatment she was under?

A. Dr. Hart and Dr. Mitchel came to examine her foot at the store.

Q. You may state to the jury, if you can, how she managed this foot and treated it after the injury and until she left your house.

A. She bathed it in hot and cold water, according to the doctor's directions, and kept it in batting and flannels, and kept it in an elevated position.

Q. What would you say with relation to the kind of care, whether she was careful or negligent?

55 A. I think she was exceedingly careful.

By STEARNS:

Q. What time was it this accident happened?

A. On the 31st of May, at about half past nine or a little later in the evening.

Q. You knew this place was open when you went along?

A. I did not think about it.

Q. You had seen it open?

A. I think two weeks before.

Q. Did you notice it being repaired in the meantime?

A. It might have been repaired. Sometimes I went on that side and sometimes, on the other hand, I went in my carriage.

Q. You did not know of Dr. Jones repairing it before this accident?

A. Mr. Herdman told him it ought to be repaired.

Q. You do not know whether he did so or not?

A. I do not; I think it was out two weeks or more.

Q. You don't know how long after the accident it was repaired?

A. I do not.

Q. What day of the week was it this accident occurred?

A. Friday evening.

Q. What did the plaintiff do Saturday?

A. She remained in her room all day and, I guess, treated her foot.

Q. What did she do on Sunday?

A. She remained in her room.

Q. Monday morning she went to work?

A. She did; but I don't think she was able.

Q. Do you think she was able to work any of the time during her stay in Lincoln after the injury?

A. I think perhaps it did her as much good to work at the store as to remain in her room under that nervous excitement and intense pain. Her mind being occupied, I think it was better for her.

Q. You think her mind would have something to do with it?

56 A. I think it would affect her body.

Q. Where did she room?

A. In the second story, at my home.

Q. How did she get up and down the stairway?

A. We helped her up and down. She used her crutch and cane.
Q. She walked up and down?
A. Yes, sir.
Q. How far did she go from the building to the carriage?
A. I think the steps are perhaps 20 feet from the carriage, perhaps more than that. I never measured it; not long.
Q. Did she always have the use of the carriage?
A. She always had the use of the carriage.
Q. Both evening and morning?
A. Yes, sir.
Q. Where did she take her meals?
A. She took her breakfast at our house and her dinner and supper at Brown's until she was injured, when her dinner and supper were carried to her at the store.
Q. Were there any obstructions near this areaway where this accident happened on this evening?
A. No, sir; none that I know of.
Q. How much room on the east side of the tree on this street?
A. I cannot tell how wide that sidewalk is.
Q. Was it 20 or 25 feet wide?
A. Not that wide, I hardly think.
Q. Would you say there was room for three persons on the east side of the tree to walk along and still remain on the sidewalk?
A. Yes, sir.
Q. You were walking three abreast altogether?
A. Yes, sir.
Q. Do you remember whether you were engaged in an absorbing conversation at that time?
57 A. I remember the conversation.
Q. I simply ask as to the effect of the conversation. Was it so as to make you unmindful of the surroundings?
A. Yes, sir.
Q. How far were those chairs you spoke of from where this areaway was on the sidewalk?
A. They were to the west of the trees; no, to the east of the trees. We went on the west side of the tree and they were on the east side.
Q. About how many feet, in your judgment, from the areaway to where the chairs were?
A. I could not tell you that.
Q. Do you remember about some steps to the store that are on either side of this areaway?
A. There is a step close to this opening not very far off.
Q. And a step on the other side?
A. I think there is a step on the other side.
Q. There are steps on each side of this areaway, are there not, going into the building?
A. I am not positive.
Q. Describe that areaway, form of, size, and how far from the building.
A. I should think—it seems to me it was two feet across from the

building, and, perhaps, the longest way three foot. I did not measure it; perhaps it is longer.

Q. When the plaintiff stepped in, which way did she fall?

A. She fell right forward. One foot went down, and she went on the sidewalk. She did not fall to the left; more to the front than to the side.

Q. How rapidly were you walking?

A. Not very rapidly.

58 Q. But she fell clear down?

A. Went clear down on the sidewalk.

Q. Did you examine the hole in the walk at that time?

A. No, sir; not that night.

Q. You didn't know the depth?

A. No, sir.

Q. What distance from where she stepped to the sidewalk?

A. Between two or three feet. I did not measure.

Q. What did she step on?

A. The grating.

Q. What was the condition of the grating?

A. One end was broken.

Q. It was — a broken condition right under the hole?

A. Clear down in the hole. If she had stepped on the ground it would not have hurt her so bad.

Q. You were with this plaintiff most of the time, were you not?

A. Nearly all the time.

Q. Now, what applications did she put upon this limb during the day?

A. She bathed it at the store with hot water and cold water as prescribed.

Q. How often was this done?

A. I cannot remember; several times a day.

Q. Anything else?

A. The batting and the flannels were kept warm.

Q. The only things used were hot and cold water?

A. I think some linament of some kind.

Q. Some linament, you say?

A. I think I went to Mr. Relander's for the linament.

Q. Is it not a fact that she used nothing except alcohol?

A. I think there was something else used. I don't know what it was.

Q. There was something else used, to the best of your judgment?

A. Yes, sir.

Excused.

59 D. C. VAN DUYN sworn and testifies:

By HALL:

Q. Do you live in the city?

A. I do.

Q. What official position do you occupy?

A. City clerk.

Q. Did Margaret J. Power ever file a claim with you against the City of Lincoln for damages?

A. Yes, sir.

Q. What action, shown by your record, was taken by the city council?

Objection; improper, incompetent, etc. Sustained.

Q. State whether the claim was allowed or rejected.

Objection. Sustained.

Q. You may state whether there was a claim of Margaret J. Powers filed with the city clerk of this city for damages for injury received on the 12th street in May, 1889.

Objection, as incompetent and not representing the claim this action is based on. Overruled.

A. Yes, sir; there was such a claim filed.

By STEARNS:

Q. Have you that claim with you?

A. Yes, sir.

By HALL:

Q. When was this claim filed that is spoken of by you?

Objection; improper. Sustained.

Q. Was this the claim you testified to awhile ago?

A. Yes, sir.

Q. When was that claim filed?

A. June 24th, 1889.

Signature identified by Miss Power.

Plaintiff offers in evidence the claim filed by Miss Power before the city council on June 24th, '89, the same marked "Plaintiff's Exhibit A and D."

60 Defendants object to the introduction of this claim for the reason that it is immaterial, irrelevant, and states a different claim from the one sued upon in the petition in this action.

Objection overruled. Def't excepts.

By STEARNS:

Q. Is this the only claim filed with you by this party?

A. All that I have any notice of or record of.

Excused.

Miss HARMON sworn and testifies:

By HALL:

Q. You reside in this city?

A. Yes, sir.

Q. What is your business?
A. I am head clerk in Mrs. Gosper's store.
Q. Are you acquainted with the plaintiff in this action?
A. Yes, sir.
Q. How long have you known her?
A. Since about the middle of March, 1889.
Q. You may state what you know, if anything, about an accident that happened to the plaintiff in this action on the evening of the 31st of May, 1889.
A. Mrs. Gosper, Miss Power, and myself were going home about half past nine on Friday evening, and were walking on the west side of 12th street, and we were engaged in a conversation at the time. We were walking along together, and there were some chairs out on the sidewalk and we passed along near the building on that account, and we walked just inside the tree near the building, and Miss Power stepped into an areaway or hole with her full force, stepped on her foot and hurt it and fell forward with her whole weight, and at the time we were both surprised at her falling. We picked her up and a gentleman came running up and asked if she had a fit
61 or hurt, something to that effect. She said she was badly hurt. We helped her out. Mrs. Gosper spoke of her carriage or a hack, and just at that time stepped on ahead and saw the 12th-street car coming and helped her into the car, and after we got into the car she said she believed she had better pull off her shoe, her foot hurt so. We found her foot so badly swollen, and she said, If I take it off I cannot get out. We helped her out and Mrs. Gosper called Dr. Hart, who lived just north. The Dr. came and I believe used hot water. I do not know exactly what he did. That is the circumstances as they occurred.
Q. Who was that gentleman that came up from behind?
A. I do not know.
Q. State whether or not it was light enough to recognize him or not.
A. No, sir; it was not.
Q. What do you know about whether or not Miss Power suffered any pain while at your place?
A. Suffered a great deal of pain.
Q. What do you know about the care taken of the foot?
A. She had the very best of care.
Q. Do you know of her having used this foot while at your place?
A. She did not use it.
Q. Did she try to use it?
A. No; she was suffering with the pain all the time, but of course sometimes she tried to stand on her heel.
Q. How did she walk?
A. Always assisted with a crutch and cane.
Q. Now, you may state whether or not you had ever noticed the condition of the sidewalk at the place of the injury.
A. I cannot tell you anything especially about the opening of that are away. When Miss Power and I went down we gen-

62 erally kept on the other side, and when she did not go with me I usually went on the car.

Q. You had not noticed the defective sidewalk?

A. No, sir.

Q. Did you see the place next morning?

A. I went and looked. The grate was down in the areaway.

Q. What was the condition of the grate?

A. It was broken off a little at one corner. There was a little boy with me—Wilson Muir. We stopped and looked in this place and I told him about the accident.

Q. The same place the injury occurred?

A. Yes, sir.

By STEARNS:

Q. How many chairs were there out in front of the Transit hotel?

A. I could not tell how many.

Q. About what part of the sidewalk were they?

A. On the outer side, and perhaps in the middle.

Q. How many—two or three, or more than two or three?

A. Perhaps there were two or three; maybe five or six.

Q. How wide was the sidewalk along there?

A. I could not estimate.

Q. Twenty or twenty-five?

A. It is the usual width of streets—pretty wide.

Q. How much space between the tree that is close to the areaway and the outside of the street? Was there room for three on the other side of the tree?

A. I don't know exactly how wide the space is.

Q. The trees are not more than half way out on the sidewalk?

A. I should hardly think it was half way.

Q. More sidewalk on the outside of the tree than on the inside?

A. Not a great difference.

63 Q. There are some steps on either side of the areaway?

A. There is one low step.

Q. How this areaway is in from a line from this step?

A. I should think so; I do not remember about that.

Q. Who was next to the plaintiff at the time the injury occurred?

A. Mrs. Gosper.

Q. Was you engaged in an animated and absorbing conversation?

A. We were in an earnest conversation.

Q. Absorbing your attention?

A. Yes, sir; talking and not thinking of the sidewalk.

Q. You did not know of the defect prior to this?

A. I did not.

Q. Do you know the gentleman that came up?

A. No, sir; I did not.

Q. You do not know whether you was acquainted with him or not?

A. No, sir; I think he was a stranger. I cannot remember his face. I could have remembered if it had been you, Mr. Stearns.

Q. Was you in any way interested?

A. Only that she was hurt, and we were interested in that.

Q. This stranger did not come up until after the injury.

A. He was sitting on the sidewalk. She had not received the injury at that time. We only noticed that there was a man sitting on the sidewalk as we came along, and did not, of course, take note of the man.

Q. You do not know whether you would know him or not?

A. No; I do not.

Q. You was excited?

A. I was not so excited but what I could have remembered him if you had of come up or some one had come up; of course, I would have known them, but he being an entire stranger I did not.

Q. Which way did the plaintiff fall?

64 A. Perfectly prostrate, her head toward the north.

Q. In front?

A. Yes, sir.

Q. You think she fell directly in a line as she was coming?

A. Yes, sir.

Q. Do you know the distance she fell from the sidewalk?

A. I noticed this grating was on the ground; and, of course, it was the whole distance she fell, whatever distance that is.

Q. Can't you estimate that distance from the sidewalk?

A. I could venture. I do not think I would be very correct, but I think two feet.

Q. It was the grating that belonged in the areaway that she stepped on?

A. Yes, sir.

Q. How much was it broken—this grating?

A. About so much (witness indicates).

Q. What shape was this iron that filled the hole, round or square?

A. It fitted the areaway, of course.

Q. What shape was it?

A. Well, the corner was broken off—semicircular in its original condition, as I understand, before the corner was broken off.

Q. How much was broken off?

A. Not a half.

Q. What was the size of the piece?

A. It was evidently broken off enough to allow it to go to the bottom of the areaway.

Q. How did you walk going along, in a line or one ahead of the other?

A. Miss Power might have been a little in advance. I do not remember that she was in perfect line with us.

Q. Were you all talking together?

65 A. Yes, sir.

Q. How was it you were so close to the building?

A. To avoid the chairs.

Q. Any of the chairs on the north side of the building known as the Transit hotel?

A. I do not remember.

Q. Is it not a fact that the chairs were a great many feet from this areaway?

A. I know they were quite a number of feet from the areaway. They were up nearly to the tree.

Q. How far would you say the tree was from the building?

A. I do not know exactly.

Q. Eight or ten foot?

A. Perhaps it is.

Q. Was there room for all three of you between the tree and the areaway?

A. I do not know; I suppose there was.

Q. Would not that be your best judgment that it was?

A. I never tried, so I could not say.

Q. Have you any judgment about it?

A. I have not. I do not like to say yes when I know nothing about it.

Q. You spoke of the care the injured limb received. What was done?

A. Well, when the injury first occurred, as we said, we called Dr. Hart, who used hot water first, and then he put on the bandage that were used that night. What he prescribed was thoroughly used. We attended to the foot—gave it every attention that could be given. The next morning she had a terrible headach- and suffered a great deal. Dr. Hart was called in in the morning and gave her some medicine for her head. She remained home all day, and was taken care of in the very best way.

66 Q. Who remained with her?

A. Mrs. Gosper and Mrs. Graham.

Q. Was you with her the next day?

A. No, sir; except noontime and evening. I went to the store the next day. I remained at the store all day. At noon I went up to her room. I did nothing, but she was suffering with her foot.

Q. When she was at work at the store the next Monday morning how much was you with her?

A. I was with her all the time except what time I was called into the store, going in and out.

Q. Did you pay any particular attention to the care she was giving her limb?

A. Yes, sir.

Q. You had that on your mind?

A. Yes, sir; whatever attention I could give I was glad to do so.

Q. And did she call upon you to assist her?

A. Yes, sir.

Q. What did she do for her foot while in the store?

A. Well, she put *in* upon the stool, as the doctor told her to use the stool and keep her foot in line with the body, and rested it in that way, and we had conveniences where we could heat hot water, and she would lay asice her work and have the hot water

poured on her foot; and also she used a liniment that Doctor Hart gave her, and kept up an artificial heat. It was quite difficult to keep the foot warm, and we have her every attention possible.

Q. Considerable inflam-ation in the foot?

A. Yes, sir.

Q. Did she do about her usual amount of work?

A. Of course she could not accomplish as much. She could get nothing for herself. Everything has to be carried to her. She could not be as active.

Q. In that respect she could not do as much?

67 A. Well, she had more time at noon. Her meals were sent to her.

By HALL:

Q. Do you know how she was carried back and forth to the store?

A. Yes, sir; she was taken in the carriage every morning and night.

Excused.

Mrs. THOMPSON sworn and testifies:

By HALL:

Q. Mrs. Thompson, do you live in the city of Lincoln?

A. Yes, sir.

Q. Did you in 1889?

A. Yes, sir.

Q. Are you acquainted with the plaintiff, Miss Power?

A. Yes, sir; slightly.

Q. Whereabouts do you live or did you live in the year 1889?

A. 14th and Q streets.

Q. Where you keeping house or boarding?

A. Practically keeping house. I took some meals out.

Q. Where did you take your meals when boarding?

A. Odell's, on N street, between 11th and 12th streets.

Q. You may state whether or not in going from your home you went along 12th street.

A. We often went that way.

Q. Which side of 12th street?

A. Mostly on the west side.

Q. Do you remember of having heard of an accident on 12th street caused by stepping in an opening?

A. Yes, sir.

Q. Do you know what property that was in front of?

A. Dr. Jones owned it.

Q. Now, you may state to the jury what condition you noticed an areaway covered with an iron grating—what condition prior

68 to this accident—as you passed along.

A. Well, I had seen it broken, as I supposed, was uncovered—

Q. Was the iron grating off?

A. Yes, sir.

Q. Who was with you when you went along and saw this uncovered?
A. My little boy.
Q. How old is he?
A. Seven, now.
Q. What precaution, if any, did you take to prevent your little boy from stepping in?

Objection sustained.

Q. For how long did you notice that place in that condition prior to that accident?
A. It may have been two weeks or not as long; somewhere in that neighborhood.
Q. Did you notice that hole was uncovered as you went along?
A. Did not notice every time that it was uncovered.
Q. But during that length of time you did notice it was uncovered?
A. I saw it open occasionally.
Q. You think for two or three weeks?
A. Yes, sir; but I cannot say it was uncovered that many times; I saw it two or three times.
Q. How did your attention happen to be called to that?
A. I was afraid my little boy would step in.
Q. Do you remember of hearing of this accident after it occurred?
A. Yes, sir.
Q. Did you hear where the accident occurred?
A. Yes, sir.
Q. And that was the same place you have testified about?
A. Yes, sir.

69 By STEARNS:

Q. Do you remember about the first time you noticed this hole?
A. No; I cannot tell when it was.
Q. How many times did you notice that there was a hole in the areaway?
A. I think two or three times; probably three or four.
Q. You don't pretend to say that from the first time you saw it until the last it was open all the time?
A. No, sir; I would not say that.
Q. How many times was it repaired?
A. I do not know.
Q. Did you know it was repaired after you saw it?
A. I do not *not*.
Q. Where was this grating that belonged in the hole there?
A. Well, where it was I cannot say.
Q. Just tell me where this hole was?
A. Well, I don't just know how far from the corner.
Q. Where was this semi-circular iron, the part that was displaced, the part that filled up the sidewalk?
A. Well, I do not remember. I noticed it was broken.
Q. Was you close enough to look in?

A. I do not know that I did look in.
Q. Did you know from your own observation that this iron was broken?
A. I did.
Q. How did you discover that?
A. When I went along there.
Q. Do you know whether it was before or after the accident?
A. Well, it was before.
Q. How long did you see this opening after the accident?
A. I do not remember of seeing it open afterwards.
70 Q. How long before the accident that you saw it uncovered?
A. I don't think but two or three days.
Q. Have you seen it open since?
A. No, sir.
Q. Do you know how the iron became broken?
A. I do not.
Q. Had you ever seen any one throwing ice through that hole?
A. No, sir.

Excused.

JOSIE L. DOWDON sworn and testifies:

By HALL:

Q. Miss Dowdon, where do you reside?
A. 428 North 12th street.
Q. What is your business?
A. Millinery.
Q. Where is your place of business?
A. 1146 O street.
Q. Between what streets?
A. 11th and 12th streets?
Q. Are you acquainted with the plaintiff, Miss Power?
A. Slightly acquainted with the lady.
Q. What is your business?
A. I am in the millinery business.
Q. State whether or not you frequently went along 12th street on the west side from north of O street.
A. Frequently passed along on that side of the street.
Q. About how often?
A. At least four and sometimes six every day.
Q. On what side did you usually take in going to and fro?
A. The west side, between O and P streets.
Q. Do you remember of hearing about an accident that happened to the plaintiff in front of the Jones block on 12th street?
A. I do.
71 Q. About where?
A. I know about where it was said to have happened. I did not witness it.
Q. What was the condition of the sidewalk in and about the first

areaway from the stairway in the Jones block, between O and P, on the west side of 12th, in May, 1889, prior to this accident?

A. Part of the time it was open and part of the time broken, and the broken part of the grate was away part of the time, and part of the time the grate was inclining into the areaway.

Q. Did you ever see the grating lying on the sidewalk before it was broken?

A. I remember the areaway being open. I have seen it.

Q. Now, for how long a time did you see that areaway open?

A. Well, that is rather hard to tell; at least for two weeks. It seemed so strange that it was open, I guess, is why I noticed it.

By STEARNS:

Q. How long did you say it was open?

A. At least two weeks.

Q. Did you notice it every time you passed?

A. Every time.

Q. Would you swear it was not repaired during that time?

A. It was open when I passed by.

Q. Noticed it every time; cannot be mistaken?

A. Cannot be mistaken.

Q. Could not have forgotten one time?

A. No, sir.

Q. And you will swear that there was no repairing done or that it was not replaced during that time?

A. It was simply open.

Q. The grating was out of the areaway?

A. Yes, sir.

Q. Do you know of its whereabouts at any time?

72 A. No; I do not; it may have been at the bottom or on the side.

Q. Between what periods did you see it open?

A. I saw it open a number of times, not only one.

Q. Fix the period in which you saw it—when were the two weeks?

A. The last two weeks in May.

Q. How long did it run into June?

A. It may have been a month; I could not say.

Q. You know it could not have been less than two weeks?

A. I think it was two weeks.

Q. May you not have been mistaken?

A. I do not think I am. I am willing to take my oath that I am not.

Q. Do you know who opened it?

A. I do not.

Q. Did you see any one use it in May?

A. I have seen ice put in.

Q. Do you know who the ice man was?

A. I did not pay any attention.

Q. Do you know how large the chunks were?

A. I did not pay any attention to their size.

Q. What would you pay ten cents for?
A. I do not know.
Q. See it put in more than one time?
A. Occasionally when I went along I saw ice being put in.
Q. What direction from this areaway is the nearest tree along there, the one that is the closest?
A. My memory is that it is more north than south.
Q. How far is that tree from the areaway, in your judgment?
A. Well, as I remember, about this space. (Witness indicates.)
Q. The distance in feet?
A. Let's see; four feet, five feet—hard to tell.
Q. Would you say it was eight feet?
A. Let me see what is a yard; let me measure by — own way. We ladies hardly ever get more than a yard. I should think about four feet; it may have been more or less.
Q. What would you say as to the space on the east side?
A. That was wider.
73 Q. How wide is the sidewalk along there?
A. It is supposed to be twenty feet, the whole thing, I would think, from the requirements of the ordinance.
Q. Swearing from the ordinance?
A. Yes, sir.
Q. Pretty wide sidewalk?
A. Yes, sir.

Excused.

Mrs. J. C. DAVIS sworn and testifies:

By HALL:

—. Mrs. Davis, you live in the city?
A. I do.
Q. Did you in 1889?
A. Yes, sir.
Q. What is your business?
A. Millinery.
Q. And where is your place of business?
A. Corner of O and 12th.
Q. Where is your residence?
A. 428 North 12th street.
Q. On what street do you generally go from your residence to your place of business?
A. On the west side of 12th to P from O, and then cross at McBride corner and go on north.
Q. Do you know the plaintiff in this case, Miss Power?.
A. I do.
Q. In 1889?
A. Yes, sir; well acquainted.
Q. Do you know something about an accident that occurred to her in May, 1889?
A. I do.

74 Q. You may state whether or not you have noticed the condition of the iron grating that covered the hole or areaway in the sidewalk, being first areaway south of stairway in the Jones block, on 12th street.

A. I noticed the south one or the one next to the south one; I would not be positive.

Q. How long did you notice that uncovered?

A. I noticed it several times. I could not say how long; I passed so often for so many years.

Q. During that length of time did you notice that hole uncovered prior to this accident, and how long?

A. Yes, sir; I should judge for a week or two.

Q. Do you remember seeing the iron covering; what shape is it?

A. It is a half circle.

Q. At the times you saw the opening was the iron grating lying around there?

A. I think it was lying up against the side of the building; but it might have been taken away; it was not where it should be.

Q. The hole was open?

A. Yes, sir.

Q. What is your best judgment as to how frequently you saw that part of the sidewalk in that condition—the hole uncovered—approximately?

A. Three or four times, at least.

Q. And during what length of time did you notice that condition?

A. It seems to me more than a week; must have been two weeks; but I would not say it was open every day.

Q. Did you notice the condition after the accident?

A. I don't think I did.

Q. What did you notice relative to the chairs being on the sidewalk in front of the Transit hotel of evenings?

A. They would collect more on the outer edge of the sidewalk than next to the building. The trees were also in the way.

75 Q. Do you remember whether there was a tree nearly opposite this hole in the sidewalk?

A. Yes, sir; one very close. I do not know how close.

By HOLMES:

Q. When was your attention first called to this hole?

A. I think between myself and husband.

Q. About how long before you heard of this accident?

A. I could not state just how long.

Q. State as near as you can.

A. I think it was two weeks that I had seen it uncovered.

Q. Did you notice that place that day the accident occurred?

A. I do not know. Perhaps my attention was not called to it every day, but very nearly. I passed so many times.

Q. For two weeks you mean to swear that it was uncovered all the time?

A. No, sir.

Q. You noticed this grating standing away and lying upon the sid-?

A. Somebody had taken it out, and *and* I think some one had put it near the building.

Q. When was that?

A. I could not say.

Q. How long before this accident?

A. I could not say.

Q. When you saw it standing up by the building how far was it from this hole or areaway?

A. It was probably two feet.

Q. How was that grate broken at that time?

A. Well, it was very close to the south side of the grate. The end had dropped off.

Q. You noniced the hole?

76 —. Yes, sir.

Q. When did you notice that?

A. Well, some time before this accident happened.

Q. Well, about how long before?

A. A week or two; perhaps more.

Q. May be less?

A. No; I think not.

Q. You would limit it to two weeks?

A. Yes, sir.

Q. When was the first time you noticed the grate was broken and this end down?

A. I noticed the grate off a year or two before that; but this spring it was out a good deal.

Q. During these two weeks did you notice it covered at all?

A. I could not say; it might have been, and then removed again.

Q. It is not a fact that you have noticed it with the grate on?

A. Most certainly; but it was off during all that time when I noticed it.

Q. But the first time you noticed that entirely off was two weeks before?

A. Yes, sir.

Q. Where did these chairs stand on this sidewalk in relation to this hole?

A. O, quite a ways; perhaps thirty feet.

Q. How much space was there between the chairs and the areaway and the hole in the sidewalk?

A. Well, of course, you passed the chairs, but there would be plenty of room; they were on the outer edge of the sidewalk.

Q. Did you notice any step along there?

A. Steps in each one of these stairways?

Q. How far from this areaway?

77 A. Not very far.

Q. How far into the sidewalk did they extend?

A. 12 or 14 inches.

Q. About how far from this areaway?

A. Three feet; maybe less or little more.
Q. Now, how much room was there on this sidewalk for persons to walk immediately opposite this lightway?
A. Between that and the tree there are several feet.
Q. Well, about how much space between the tree and the areaway?
A. Well, four or five feet; maybe six feet.
Q. Is this tree directly opposite the areaway?
A. I do not think it is.
Q. Then the tree would not have anything to do with it?
A. Yes, sir.
Q. How would the tree interfer-?
A. Well, the sidewalk is divided; you cannot go directly straight north.
Q. How much space on the outside of the tree?
A. Quite a number of feet.
Q. Plenty of room to walk there?
A. Yes, sir.

By HALL:

Q. Do you remember whether it was a crooked or straight tree?
A. Crooked.
Q. Which way did it lean?
A. I think it leans this way (meaning west).

Excused.

T. A. HERDMAN sworn and testifies:

By HALL:

Q. Mr. Hardman, where do you live?
A. In West Lincoln.
Q. Where was you in business in May, 1889.
78 A. In business at the corner of 12th and P streets.
Q. Between O and P streets?
A. Yes, sir.
Q. Which side of 12th street?
Q. On the west side of Twelfth.
Q. What building were you in?
A. I was in the block known as the Jones block.
Q. Which store-room was you in, in reference to the stairway?
A. In the store-room on the north side.
Q. What business were you in?
A. Confectionary business.
Q. Who was with you?
A. Mr. Cox.
Q. Anybody else?
A. No, sir.
Q. Who kept the store-room next to you?
A. My brother, with his meat market.

Q. What is his name?
A. George S. Herdman.
Q. Do you remember an accident that happened to Miss Power just near your place of business in May, 1889?
A. I remember hearing about it the next morning.
Q. Did you hear where the accident happened?
A. Yes, sir.
Q. At which areaway or light-hole did you understand that was?
A. The one right south of the store building I kept.
Q. The one south of the stairway?
A. Yes, sir.
Q. What was the condition of the hole in the sidewalk?
A. Well, the condition when I saw it was one end was broken and the other end lying upon the sidewalk.
Q. Was that the condition the next morning?
79 A. I believe it was.
Q. How long did you notice that grating in that condition or a similar one before the accident?
A. Well, I should think a week or more.
Q. A week or more is your best recollection?
A. A week, anyway.
A. At least a week?
A. Yes, sir.
Q. Was it off continually during that time?
A. I think it was.
Q. You may state if it was broken it could be made to stay where it belonged.
A. No, sir; I do not believe it could be.
Q. Put it on it would fall back?
A. Yes, sir.
Q. Did you ever have any conversation with any one relative to that being a defective place?
Q. Well, I had a conversation with several parties; there was a party living upstairs who took some banana-peeling away from my stand.

(Move to strike out. Overruled. Excepted to.)

Q. You may state whether or not you had your attention called to this defective or dangerous place during that interval.

Objection, leading, suggestive, and incompetent. Overruled. Excepted to by defendants.

A. That is the party I drew their attention to, and I spoke to several, and I recollect I call- the attention of the officer to it.
Q. Who was that officer?
A. I could not say. I think officer Ireland.
Q. What office did he hold?
A. I could not say. I think he was a police officer.
Q. Was this street on his beat?
80 A. I could not say. I was a stranger to all the officers passing.

Q. Did you frequently see a policeman patrolling that block?
A. Yes, sir.
Q. Along this defective sidewalk?
A. Yes, sir.
Q. What did you say to this city official?
A. I spoke to him about the place being unprotected; that it ought to be fixed.
Q. Do you remember what he said?

Objection. Overruled. Excepted —.

A. I do not.
Q. How long was that before the accident happened?
Q. Why, I could not state how long; maybe a day or so.
Q. Do you know how that grate got broken?
A. Yes, sir.
Q. How did it get broken?
A. By the iceman putting in ice; dropped down on it and broke it.
Q. Did you see Dr. Jones fixing the grate after it was broken?
A. No, sir; not until after the accident?
Q. Was that grate ever broken until the iceman broke it?
A. Not that I know of.

By HOLMES:

Q. Where was your place of business from this place in the sidewalk?
A. Just south of where I kept my confectionary store.
Q. When was the first time do you remember of discovering that hole?
A. Well, it was right after it was broken.
Q. How long was that before this accident is alleged to have occurred?
A. It must have been a week.
81 Q. When was it you called the officer's attention to this hole?
A. Some time about seven in the evening.
Q. About how many days before this accident?
A. Could not say for sure; must have been three or four days.
Q. You may state the condition of the walk along there in reference to its being light at that time.
A. I kept my place of business lighted up until half past 11 or 12. It was pretty light on the walk.
Q. How far from this hole?
A. About sixteen feet; twenty at the outside.
Q. Up to the time the iceman began putting in ice the grate was over the hole?
A. Yes, sir; until the iceman interfered.
Q. Do you know why he put it in there?
A. He put it in the cellar for my place of business.
Q. Prior to that, this was a safe place, was it not?

A. Yes, sir; I told him he had better be sure and put it in careful or he would break it.

Q. Then after you had spoken to this iceman this grate had been taken out?

A. Yes, sir; he took it out and put the ice in and put the grate back, and he broke the grate putting it back and not putting in the ice.

Q. How long had he been taking it out before he broke it?

A. Three or four mornings that he put in the ice.

Q. How did he break that grate?

A. I can hardly explain. The grate is two inches thick, of casting, and he let it fall and broke.

Q. You are not mistaken about the falling?

A. I don't believe I am.

Q. How long had he been in the habit of taking it out to put in ice?

82 A. Three or four days before it was broken.

Q. After it was broken what condition did it remain in?

A. One part upon the sidewalk and the other part dropped down in the hole.

Q. How long did it remain that way prior to the accident?

A. A week or more.

Q. Who was the iceman, if you know?

A. Henry Westerwick.

Q. Do you know who he was working for?

A. Lincoln Ice Company.

Q. How large were the pieces of ice he put in there?

A. 150 to 180 pounds.

Q. For whom was he putting it in?

A. For myself. He was working for the Lincoln Ice Company.

Q. Who kept the store next to you?

A. Nobody.

Q. It was a vacant building?

A. Yes, sir.

Q. As I understand, the cellars were connected and your got your ice through there?

A. Yes, sir.

Q. Why did you not put it in your own cellar?

A. Because the iceman did not come early enough in the morning and I would have to remove my fruit stand.

Q. Had you obtained the consent of any one to use that window?

A. No, sir; I had not.

Q. Had you any right upon those premises by right of your occupancy od the other store-room?

Objection. Sustained. Exceptions.

Q. To what policeman, Mr. Herdman, did you carry this information about the hole?

A. I do not know the officer for sure.

83 Q. Are you acquainted with officer Otto?

A. No, sir; I do not know him.

Q. Do you know the officer that patrolled that beat, that street?
A. No, sir.
Q. You wont be positive yot it was officer Ireland?
A. No, sir.
Q. How long was it before this accident occurred that you told him?
A. I could not say; three or four days.
Q. What kind of a looking man was this officer you had the conversation with?
A. Now you have got me; I cannot tell.
Q. Can you describe him?
A. No, sir.
Q. Was there anybody present when you had the conversation?
A. No, sir; I was standing on the outside.
Q. Did you see any person replace that grate?
A. No, sir.
Q. See anybody displace this except the iceman?
A. I saw the Dr. Jones after the accident.
Q. Do you know whether that grate was put in at any time before the accident?
A. Do not.
Q. How many times did the iceman put that in before he broke it?
A. For three mornings.
Q. And the last time he broke it?
A. Yes, sir.
Q. When is the last time you remember of seeing that hole before the accident?
A. I cannot tell you exactly; must have been two or three days.
Q. Was it open all that time?
A. Yes, sir.
84 *A. Yes, sir.*
Q. Where was the grate at that time?
A. In the hole.
Q. Did you ever fix that place?
A. No, sir.
Q. Why didn't you?

Objection, incompetent. Overruled.

A. I did not have time; I was not in that business.
Q. Mr. Herdman, did you ever make an affidavit in reference to this matter?
A. I made an affidavit, but I do not know what it was.
Q. Look at that. (Hand-paper.) Is that your signature?
A. I believe it is.
Q. You signed and swore to that?
A. Yes, sir.
Q. It was read to you?
A. Yes, sir.
Q. You were satisfied that the facts were about as they were stated?
A. Yes, sir.

Q. This was sworn to at the time stated here?
A. I would not say for sure.
Q. How long after the accident?
—. Some time.
Q. How long, as your now remember?
A. Couple or three or four days.
Q. You were then more familiar with the facts?
A. Yes, sir; I suppose so.
Q. Mr. Herdman, who brought that paper and asked you to sign it?
A. Dr. Jones.
Q. What did he say he wanted you to sign it for?
A. To show that he — no knowledge of the grate being open.
Q. Did he say anything about him being liable?
85 A. He did not.
Q. Did you read this affidavit?
A. I did not; I could not say whether Mr. Stearns or Mr. Strode.
Q. Do you know whether they read it correctly or not?
A. I do not.
Q. Which one of these gentlemen read it, Mr. Stearns or Mr. Strode?
A. I do not know.
Q. What sort of a light was it you had out there by your stand?
A. It was large one.
Q. What did you burn?
A. Gasoline.
Q. Which side of the fruit stand was it?
A. Right over the center.
Q. How high up did it hang?
A. Five or six feet from the sidewalk.
Q. Any obstructions between where that lamp hung and south where this airway was, so that it would not throw the light?
A. Nothing.
Q. Do you remember of being at your place of business on the evening of this accident?
A. Yes, sir.
Q. Was you there at the time this plaintiff fell?
A. No, sir; I was somewhere about the store; was not outside.
Q. Do you know whether your lamp was burning?
A. I think it was; we always had the night light there.

Excused.

86 Mr. GEORGE HERDMAN sworn and testifies:

Q. Mr. Herdman what business were you in in May, 1889?
A. Butcher business.
Q. Where was your place of business?
A. Corner of P and 12th streets.
Q. Where was your store-room in reference to your brother's place of business?
A. Next door north.

Q. Do you remember of hearing of an accident that happened near there in May, 1889?

A. About that time; yes, sir.

Q. Was your attention called to this place?

A. Yes, sir; some one told me of it.

Q. Where is that areaway in reference to the stairway in the Jones block?

A. Just south of the stairway, I understand.

Q. What condition had you seen that place in prior to this accident?

A. That is almost impossible to say. Prior to the accident I paid but little attention to it.

Q. Did you ever pay any attention to it?

A. I noticed the grate; but whether it was prior to that accident I could not say, but I should judge it was. I noticed the grate was not properly put in in place, one edge of the grate. It is a half circular and extends from the building about 18 inches, and it was taken out so as to put in ice, and one edge was broken off and let it drop down in so that it was not safe.

Q. Did you ever notice that hole with no covering over it?

A. Yes, sir.

Q. For how long a time did you notice it in that condition?

A. I think the condition was this: they put it in and left it out as they felt like it.

87 Q. For how long a time did it continue?

A. I think it was put in at that window for two or three months. I used to go down cellar and knew that there was no other place, and I believe that existed for two or three months.

Q. Did you ever notice that it was broken?

A. Yes, sir.

Q. For how long a time was it broken?

A. I could not say.

Q. After it was broken could it be made to stay in its place?

A. I don't know; it probably could.

Q. Did you notice the condition of the hole the next morning after this accident?

A. No, sir.

Q. You don't know how long the grate was broken?

A. No, sir.

Q. Have you any recollection on the subject?

A. I could not state just how long.

Q. At the different times you saw this hole uncovered did you notice whether the grate was broken?

A. No, sir; did not.

Q. How—about how long did you notice this hole uncovered?

A. It continued right along for two or three months; they put ice in and sometimes did not cover it.

By HOLMES:

Q. Where was your place of business?

A. Right next to that of my brother.

Q. Were you in business with your brother?
A. No, sir.
Q. How far from the hole was your place of business?
A. 55 or 60 feet.
Q. How did your attention happen to be called to the delivery of the ice?
88 A. We used to go down to the cellar—two doors connected the room occupied by my brother and the cellar of the vacant store—we used to go into the cellar under the vacant building and see the ice put in at the window through the areaway.
Q. How did you happen to go through there?
A. The water-closet was in that cellar.
Q. You have noticed that ice for two or three months?
A. Yes, sir; prior to this accident.
Q. You also noticed this grate over the hole, did you?
A. Yes, sir; I noticed the grate.
Q. Now, as I understand you, you were in the habit of seeing it sometimes in and sometimes out; that rested with the iceman?
A. Yes, sir; that rested with the iceman.
Q. Were you ever present at the delivery of the ice?
A. I see them throw it out and see him put it in.
Q. When was the last time you noticed the hole uncovered?
A. I could not say what month or what day.
Q. How long prior to the injury of this lady did you notice it uncovered, if at all?
A. I don't really know when that happened.
Q. Did it remain open all the time?
A. It might as well have been.
Q. Did they put the grate in in a careless manner?
A. I don't know whether stepping on the grate would drop you into the hole or not. It might have not been perfectly safe. It was not in its proper place.
Q. Was one edge upon the sidewalk?
A. Yes, sir; on the side.
Q. But still laid over the hole?
A. Yes, sir.
Q. Did you notice any one travelling over that grate?
A. No, sir.
89 Q. Is that the natural place for persons to walk?
A. I would not consider it so; it was 18 inches from the building, and the walk was 20 foot wide.
Q. Were there any other obstructions?
A. There were steps going into the stores.
Q. Do you remember whether there was more than one step?
A. I know there was one step.
Q. Is it not a fact that grate is between two steps, one south and the other north?
A. I guess that is the fact.
Q. Now, Mr. Herdman, for that reason is it not a fact that that was not considered a dangerous place?

Objection. Sustained. Exceptions.

90 Q. You had noticed the various people passing along there?

A. Yes, sir.

Q. Was that the natural place for people to walk?

Objection. Sustained.

Q. Can you tell how long prior to this accident you had noticed that hole covered or uncovered?

A. O, no.

Q. When was your attention first called to the fact that the iron was broken?

A. After the accident.

Q. You did not know it was broken prior to that; you had never observed it?

A. No, sir.

Excused.

Mr. HENRY WESTERWICK sworn and testifies:

By HALL:

Q. Where do you reside in this city?

A. 6th and J streets.

Q. What was your business in May, 1889?

A. I was working for the Lincoln Ice Company.

Q. State whether or not in the month of May, 1889, you ever delivered ice to T. A. Herdman.

A. Yes, sir.

Q. Where was his place of business?

A. Corner of 12th and P streets.

Q. Where did you put the ice that you delivered to him?

A. Down in the cellar.

Q. How did you get it down?

A. From the hole in the sidewalk and from the window into the cellar.

Q. Which window did you put it in with reference to the stairway?

91 A. There was two windows in the sidewalk—the south window and the north window.

Q. What was it covered with?

A. It was covered with an iron grating.

Q. Was it heavy?

A. Yes, sir; it was heavy.

Q. Can you tell whether or not it was broken?

A. Yes, sir; it was broken.

Q. How was it broken?

A. I let it drop on the sidewalk.

Q. You did not throw your ice onto the grate?

A. No, sir.

Q. How long did you put ice in through that hole?

A. I do not remember. It must have been a week or two or more.

Q. After this grate was broken could it be made to stay in its place?

A. I think I put it back right the first time; but after the first time it was misplaced

Q. And that continued for a week or two longer?

A. Yes, sir.

Q. How long has you been putting it in before it broke?

A. I don't remember.

By HOLMES:

Q. When did you first put ice in?

A. I don't know.

Q. I mean the first time?

A. I cannot tell.

Q. When did you hear of this accident?

A. Not until the suit was commenced.

Q. About how long had you been delivering ice?

A. Ever since Mr. Herdman started in business.

Q. How did you deliver it?

A. Down cellar; took the contract to deliver the ice down cellar.

Q. With whom was that contract?

92 A. It was an agreement between the ice company and Mr. Herdman.

Q. How did you discover you could get the ice down that way? Who told you to?

Objection sustained. Excepted to.

Q. How long had you delivered ice before breaking the grate?

A. I don't remember.

Q. What kind of business was Mr. Herdman engaged in?

A. Confectionary and ice cream.

Q. You were in the habit of delivering ice there?

A. I stopped there every day—took them ice every day.

Q. How much did you leave there?

A. All the way from fifty to several hundred pounds.

Q. Now, Mr. Westerwick, just state to the jury how you put that ice in there and what you done.

A. I took the grate out to get it out of the way.

Q. How heavy was that grate?

A. I don't know anything about it.

Q. How was that grate placed in that areaway—how was it held up?

A. It rested on a wooden frame.

Q. Any bars across the place to hold it up?

A. No, sir.

Q. Just rested on the side?

—. Yes, sir.

Q. Nothing else to hold it in?

A. No, sir.

Q. When you took it out did you put it back?

A. Yes, sir.

Q. You put the grate down in the hole?
A. Yes, sir.
Q. How many times did you do that?
A. I do not remember.
Q. You mean that you put the grate down in the hole and let the ice down on it?
93 A. No; I put the ice in and then put the grate down in the hole to get it off from the sidewalk, but did not place it in the hole before it was broken.
Q. That left the hole open?
A. Yes, sir.
Q. How long did it stay that way?
A. Couple of weeks or more.
Q. Do you know when this accident happened?
A. Don't remember.
Q. You don't know how long it had remained in the hole before this accident?
A. No, sir.
Q. Do you remember when that grate was broken?
A. I could not tell the date.
Q. Who broke it?
A. I did myself.
Q. How did you happen to break it?
A. Why, I let it fall on the sidewalk.
Q. Let it fall from where?
A. From where I stood taking it out. I suppose I dropped it on the sidewalk a little too hard.
Q. You lifted it up and let it drop?
A. Yes, sir.
Q. If the hole was open how did you happen to lift it out?
A. It was not open.

Excused.

Dr. HART sworn and testifies:

By HALL:

Q. Dr. Hart, where do you live?
A. In Lincoln.
Q. Did you live here in 1889?
94 A. Yes, sir.
Q. Are you acquainted with the plaintiff in this action?
A. Yes, sir.
Q. State whether or not you was called to attend her on or about the 31st of May, 1889.
A. Yes, sir.
Q. At what place?
A. At Mrs. Gosper's house.
Q. What is your profession?
A. Practice of medicine and surgery.
Q. How long have you been in that profession?
A. Nearly fifteen years.

Q. Tell the jury how you found Miss Power the evening you called and examined her foot.

A. I found her suffering from a sprain in her ankle and instep.

Q. How long did you continue to treat her?

A. I don't know the exact date, although my books show; I suppose a month or more.

Q. Pretty frequent you would call?

A. I think I called 12 or 15 times.

Q. Every day or two?

A. Yes, sir—that is, after the first few days.

Q. Do you know how she hurt herself?

A. Nothing only what was told me.

Q. What was told you at the time?

A. That she fell into an open areaway in front of a building between O and P street-, on 12th street.

Q. Tell the jury in detail the condition you found her foot in, every particular at that time and at any other.

A. Well, it was a severe straining of the ligaments and muscles; it was swollen extremely.

Q. How did that effect her use of the foot?

95 A. Prevented her from using the foot at the time.

Q. State how serious an injury that was.

A. Well, it was a severe sprain; it was what we call a very bad injury at that place.

Q. State the effect upon her general system, upon her nerves.

A. Of course, it would produce more or less shock to any person, and more particularly a lady than a gentleman.

Q. More to some ladies than to others?

A. Yes, sir.

Q. What as to this lady?

A. She seemed to be a good deal nervous, extremely nervous, for a day or two.

Q. Did you make a thorough examination, a short time prior to her leaving Lincoln, with Dr. Mitchell?

A. Yes, sir.

Q. How long after the injury?

A. Probably six weeks; don't know exactly; some time in July.

Q. What condition was her foot in, in comparison with the first time you examined, as to whether it was worse or better?

A. At that time there was not the acute inflam-ation; good deal of tenderness and weakness of the parts.

Q. Was she able to use her foot in walking and getting around?

A. I don't know that she did; she ought not to have done it.

Q. State whether or not you knew of her going to the store to work.

A. I knew of her going to the store.

Q. Where was she when you called in company with Dr. Mitchell?

A. At the store.

Q. What would you say from your examination as to the permanency of this injury?

A. An injury of that kind is very apt to leave a weak point and

usually very liable to be injured again. What I mean is that
96 an injury about the foot or ankle is liable to result quite seriously.

Q. Dr. Hart, knowing what you do from having made a diagnosis of this case at that time, what would you say to the injury being permanent if it had not recovered so that you could use the foot, the fore part of the foot, in two years?

Objection. Overruled. Exceptions.

A. The chances are that it would be a permanent injury if it had not recovered in that time with proper care and treatment.

Q. How did this injury effect the front part of the foot?

A. She could not use that without throwing the strain upon the weak point.

Q. Could she use her heel without the same effect?

A. Yes, sir.

Q. So that this injury might result in a permanent injury to the front part of the foot and without injury to the hind part of the foot?

A. Why, it could to a certain extent, without being totally disabled.

Q. What would you say as to whether this plaintiff followed your advice or direction well or not, so far as you were able to observe?

A. As far as I know, except that I recommended that she be as quiet as possible, and of course she had to go some, I would say she carried out the treatment as far as I know.

Q. Otherwise she took good care of it?

A. Yes, sir.

By STEARNS:

Q. Dr. Hart, what part of this lady's ankle or fore part of them foot was involved in this accident?

A. It was what they call the instep.

Q. Nothing beyond the ligaments that were injured.

A. Not that I recognized.

Q. What was it that was sprained?

97 A. The muscles, ligaments, and parts that unite the bones together.

Q. On the inside or outside?

A. Both sides.

Q. How severe a sprain did you first call it?

A. I called it a bad sprain—a very severe sprain.

Q. Was it best to use it? What was the best thing for her to do under the circumstances in the way of rest or work?

A. Quiet and rest is best.

Q. What was your instructions in reference to that?

A. If I remember rightly, I instructed her that way; perfect rest and quiet.

Q. Do you think, doctor, the going to work in a day or two after the injury was advisable under the circumstances?

A. No; of course absolute rest is better as far as recovery.

Q. Did not the exercise she had to take in going to the store, getting into the carriage and out of the carriage, tend to increase the inflam-ation and heat in that part of the foot?

A. Upon that theory any exercise would produce a certain amount of heat.

Q. Would not, in your judgment, going up and down stairs necessarily increase the flow of blood to the parts?

A. Yes, sir.

Q. Would not a continued exercise of that result in a permanent injury when it otherwise might not result in a permanent one but recover?

A. It might do it.

Q. So it was your advice for her to go to work in a day or two?

A. I don't think I advised that. I remember I advised rest. I know from the conversation she felt she must be at work, but I told her to use the utmost care and not use her foot at all and keep the foot well elevated.

98 Q. Did she go to work the — before consulting you?

A. I think she did.

Q. Did you say a person's foot could be permanently injured and have perfect use of the heel?

A. No, sir; you cannot have perfect use of the heel without using the forepart of the foot.

Q. What is there in a sprain of this kind, when there is no injury to the bone, that makes the injury permanent?

A. There may be a permanent injury from a rupture of the ligaments with destruction of the bone tissue.

Q. Acute inflam-ation may result in permanent injury—diseases of the bone?

A. Yes, sir.

Q. Then the first thing to do in any injury of this kind is to have the inflam-ation subside and keep it down, and that can only be done by absolute rest?

A. You might say it could be done. It is the only certain way. The only certain way is by absolute rest?

Q. The only certain way is by absolute rest.

A. I believe it is so considered.

Q. What would you say would be the natural result as to increased inflam-ation going up and down stairs to persons injured as this lady was, in the moving of the ligaments and the muscles?

A. From use arises increased inflam-ation.

A. More inflam-ation would result from use?

A. Yes, sir.

— What would be the effect to this injured limb if the person was engaged in employment and without actual use of the limb?

A. They could use the other parts without disturbing the injured limb. It would depend upon the kind of care.

Q. Can you exercise the hands without increasing the flow of blood in the limbs and increasing the heat?

99 A. Of course there is certain increase of heat.

Q. Would not that have any effect?

A. I do not think it would have any effect on the extremity of the foot.

Q. What would you say of the exercise of going up and down stairs?

A. I think I answered that by saying it would increase the inflam-atory trouble.

By HALL:

Q. You think that if they use the foot that would increase the inflam-ation?

A. Yes, sir.

Q. If the foot was not used it would not have that effect?

A. Not so much, but a little more pressure of blood.

Q. Is not that what you were trying to effect?

A. Not exactly.

Q. One trouble was it was too cold?

A. Yes, sir.

Q. So that any movement would aid the circulation?

A. My idea was that the foot should not hang down; did not want the pressure in that way; we rubbed and kept the foot warm.

Q. This foot was so cold you were fearful of gangrene setting in?

A. Do not think I expressed the fear of gangrene.

Q. There was danger of gangrene?

A. Yes, sir.

Q. You knew how she used this foot; carried it along simply with her body?

A. Yes, sir.

Q. You knew how she got back and forth from the store?

A. I don't think I knew anything about it definitely.

Q. You knew she went back and forth?

100 A. Yes, sir.

Q. If she used a crutch and cane in getting back and forth would that increase inflam-ation?

A. Of course if the foot was down it would increase the flow of blood to a certain extent.

Q. State whether or not it would be sufficient to make it a serious matter.

A. Not necessarily.

By STEARNS:

Q. It might be serious?

A. Yes, sir; it might.

Excused.

Dr. MITCHELL sworn and testifies:

By HALL:

Q. You are a practicing physician in this city?

A. Yes, sir.

Q. Are you acquainted with the plaintiff in this case?

A. Slightly acquainted.

Q. State whether you made an examination of her foot in the month of June, 1889.

A. Yes, sir.

Q. Tell the jury what condition you found it in at that time.

A. I found a very badly swollen tender foot; extremely cold. That would be a short description of the condition.

Q. What part of the foot was injured?

A. The injury seemed to be through the middle of the foot; not particularly the ankle, but the middle joint, involving the base of the toes to the meta tarsus. I have a foot in my pocket I can explain it better by.

Q. Explain to the jury.

A. These are the toes we see in the subject covered with
101 flesh. (Witness indicates the parts affected on the skeleton foot.)

Q. In what way was that particular part of the foot injured?

A. A severe wrench simply. That is as near as I can get at it, as it was described to me; simply a severe twist of this joint.

Q. What effect was that severe twist upon the ligaments?

A. It would depend upon the severity; probably destroy their elasticity.

Q. What would you say as to the severity of the injury to the ligaments in this particular case?

Q. Judging from the condition of the foot when I saw it I should say it was quite severe. The effect that inflam-ation would interfere with the circulation and render the foot very cold instead of making it hot.

Q. What would you say as to the seriousness of this accident as to that particular part of the foot?

A. Generally a sprain is a serious thing if at all severe. The ligaments, being partially torn, never fully recover, but will get practically well where the injury is not severe. In either case the absolute recovery is almost impossible.

Q. State if you made any examination or observation of the effect it had upon the general system of this lady.

A. I was not acquainted with the lady before making the examination, so I could not say what effect it had upon her.

Q. You may state whether you have made an examination of the plaintiff's injury since that time.

A. I made an examination a few days ago; I think Tuesday.

Q. What would you say of the effect upon her body, especially the nerves?

A. As to her general condition she seemed a little more nervous, a little more irritable; not able to bear the examination so well.

Q. What condition did you find her foot in the last time you examined it?

A. Not as bad as when I first examined it. I found inflam-a-
102 tion still present; not a great deal, but some. As she is right-handed her right hand is a little larger, so would it be with the foot, but in this case her left foot is the larger. It meas-

ured one-half inch more around the instep than her other foot. There was tenderness and pain in moving the joint back and forth.

Q. From your examination what would you say as to her using her foot?

A. I would not suppose she could use it. I do not believe she could walk on her heel very well.

Q. What would you say as to the elesticity?

A. It is not nearly so great as the other foot; she cannot move the lower part of her foot with her own volition.

Q. What would you say as to the bones being effected or whether they are likely to become affected?

A. In an injury of that character, followed by inflam-ation—and particularly is that true of the small bones of the foot—car-es of the bone may occur.

Q. What do you mean by car-es?

A. Rottening of the bones.

Q. What would be the result?

A. Loss of the foot. Still, it may be removed and a part saved. It may take place in this case and may not. I think there will be more or less stiffening of the joint.

Q. Now, doctor, what would you say as to the effect upon this foot if the plaintiff, a short time after the accident, moved around with her body and not using the foot?

A. With the foot properly protected I think it would be no injury to the foot, but beneficial to the body; would be better than to sit in the house and nurse her injured limb and get no general exercise. If the foot were not used it would not injure it.

103 Mr. BURR.

Q. The first time you examined this foot did you notice any injury to the bone?

A. No; I have never noticed any injury to the bone.

Q. Did you learn how this accident occurred?

A. I was told.

Q. It was only an injury to the muscles and the ligaments?

A. The injury was not to the muscles and ligaments alone, but to the part of the bone as well. An injury that will sprain the muscles where there are numerous joints, as in the foot, invariably injures the synovial membrane that lines or forms the joints.

Q. The foot is often sprained in this way?

A. It is not very common to sprain the foot in this locality, and requires a severe wrench or twist before this part gives way.

Q. What results when you step down too far on the toes?

A. As a rule, the ankle gives way instead of the arch of the foot.

Q. How long after this accident that you examined this foot first?

A. The first time I examined it was at Mrs. Gosper's house. I was there to see a member of the family and was asked about the case. Dr. Hart, I believe, was attending it. It was shortly after the accident.

Q. You did not give it the examination that you would if it were your case and you were going to treat it?

A. Yes, sir.
Q. As thorough an examination as if you were going to treat it?
A. Yes, sir.
Q. Did you prescribe for it?
A. I don't remember that I did. My usual prescriptions are hot-water applications. I might have suggested it there. In case of a sprain that would be my recommendation.
Q. Do you mean to say that simply a wrench, a severe wrench or a twist or a partial tearing of the ligaments as you describe,
104 that if you give it absolute rest and perfect treatment that it will not get well?
A. Well, sir, I mean to say that it will never fully recover its former strength; but will recover partially, so that you have practically a good foot.
Q. It would recover so you would not call it a permanent injury?
A. That depends on the degree of an injury to be permenent.
Q. It would practically recover?
A. Many of them do. A great many don't.
A. Isn't absolute rest one of the best things to do for it?
A. To a certain degree.
Q. The inflam-ation increases by irritation?
A. Yes, sir; it is irritated by movement and that increases inflam-ation.
Q. Then by constant irritation it would become chronic?
A. Yes, sir; that is correct.
Q. Then I am correct?
A. Yes, sir.
Q. Then it would not become chronic if it were kept quiet?
A. Might not.
Q. This would not?
A. I think it might.
Q. How long after the accident did you see it?
A. I do not know; a short time, I think.
Q. Do you know how many times she went up and down those stairs?
A. No, sir.
Q. You know how many steps in Mrs. Gosper's house she had to go up?
A. Nothing about it.
Q. What room did you see her in?
A. Down-stairs.
Q. Did you see her upstairs?
A. No, sir.
Q. Did you see her at the store?
105 A. I saw her there once.
Q. Did you make an examination of her foot?
A. Yes, sir.
Q. How many times?
A. Twice.
Q. What caused this to get in a chronic state?
A. Because the inflam-ation did not subside.

Q. It would have subsided if it had of had absolute rest?
A. O, no.
Q. You think it would not?
A. It might, but I think it would not.
Q. Do you mean to state as a fact or as your opinion?
A. I mean that I cannot give anybody's opinion except my own.
Q. Do you give it as a fact or as an expert opinion?
A. I believe it as a fact.
Q. It is a fact that the faculty disagree on this subject?
A. I think not.
Q. No disagreement between doctors?
A. We often have pleasamt disagreements.
Q. Was there any injury as to the bone the first time you saw it?
A. Not that I know of.
Q. Was there the second time?
A. I do not know.
Q. Any injury to it now?
A. I do not think there is.
Q. Has it injured the outer membranes of the bone?
A. I think the synovial membrane has been injured; there is a thickening.
Q. That is not an injury to the bone?
A. No, sir.
Q. It just affects the covering of the bone?
A. I don't believe I said the covering.
106 Q. Right between the bones it is filling up?
A. Yes, sir; the chronic inflam-ation invariably thickens that synovial membrane; simply an increased thickening of the material there.
Q. From increased circulation?
A. No; not particularly.
Q. If the foot was healthy the circulation would carry it off?
A. Yes, sir; if the foot was healthy it would carry off the increased flow of blood.
Q. If the circulation was good it would carry it all away?
A. Yes, sir.
Q. You say it was carried away by circulation?

Objection by court.

Q. Well, Doctor, this inflam-ation would have subsided, would it not, as usual thing, in cases of severe sprain or twists, under careful treatment?
A. Ordinarily it subsides, but it may continue under the most favorable circumstances and careful treatment.
Q. Don't you think it is a common injury to wrench the fore part of the foot in a thousand different ways?
A. The fore part, but not the middle.
Q. That part just in front of the instep?
A. It is not common.
Q. It is not a common thing for a man to sprain his instep and get well?

A. An injury of that kind is not very common, and in many cases does not recover.

Q. I am speaking of the injury that everybody meets with on their foot.

A. It is not very common in the instep.

Q. Don't they ordinarily get well? As a rule they get well?

A. I think it is.

107 Q. When, in your opinion, would be the most severe pain to this lady after the injury? Would it not be the next day?

A. Altogether probable that the most severe pain would be the next day or a short time after the accident.

Q. The covering of the bone was injured?

A. Not injured; somewhat thickened.

Q. Destruction of that bone would not hurt her?

A. O, yes; but it is not destroyed; simply thickened. The result of chronic inflam-ation. That would necessarily be painful.

By HALL:

—. Dr. Mitchell, you may state whether or not in the case you say they ordinarily get well it had been on the sprain.

Objection. Overruled. Exceptions.

A. Does not.

Q. What effect did it have or would it have on an injury of this kind for the person to rise a short distance in a carriage, walk from the house to the carriage on crutch, and from the carriage into the store on crutch and assisted by parties?

Objection by court.

Plaintiff offers in evidence the certificate of what would be page 7 of the Municipal Code for the City of Lincoln, 1889.

Plaintiff offers in evidence section 34, page 24, of the Minicipal Code of the City of Lincoln for the year 1889.

Objection, incompetent and immaterial. Overruled. Exceptions.

Plaintiff also offers in evidence section number 1107, page 313, of the Municipal Code of the City of Lincoln for 1889.

Objection, incompetent & immaterial. Overruled. Exceptions.

Plaintiff also offers in evidence section 1109, page 314, of the Municipal Code of the City of Lincoln for 1889.

Objection, because that relates to sidewqlk, whereas this accident occurred in an areaway, and incompetent. Overruled Exceptions.

108 Plaintiff also offers in evidence section 1090, pages 308 & 309, of the Municipal Code of the City of Lincoln for the year 1889.

Objection as incompetent and immaterial. Overruled. Exceptions.

Plaintiff rests.

An ordinance providing for the publication of the ordinances and laws of the city of Lincoln, Nebraska.

Be it ordained by the mayor and city counsel of the city of Lincoln:

SECTION 1. That the ordinances and laws governing the city of Lincoln, as codified, revised, and amended by Charles E. Magoon, be, and the same are hereby, ordered printed and published in a bound volume to be entitled "The Municipal Code of Lincoln."

SECTION 2. This ordinance shall be in force and take effect from and after its passage and approval.

Passed October 3, 1889.

H. H. DEAN,
Acting Mayor.

Approved October 14, A. D. 1889.
Attest:

D. C. VAN DUYN,
City Clerk.

STATE OF NEBRASKA, } ss.
Lancaster County, }

I, D. C. Van Duyn, clerk of the city of Lincoln, do hereby certify that the above and foregoing is a true copy of an ordinance entitled "An ordinance providing for the publication of the ordinances and laws of the city of Lincoln," passed by the city council of said city October 3d, 1889.

I further certify that the original ordinance of which the foregoing is a certified copy is by law intrusted to my custody for safe keeping and is on file in my office.

Witness my hand and the corporate seal of said city this 14th day of October, 1889.

[Seal of the City of Lincoln.]

D. C. VAN DUYN,
City Clerk.

109 47, § 34. The mayor and the council shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares, and commons within the city, and shall cause the same to be kept open and in repair and free from nuisances.

1107. The inspector of sidewalks and street crossing- shall have general supervision of all sidewalks and street crossings in the city, under the directions of the committee on sidewalks and bridges, and it shall be his duty to see that the sidewalks and street crossings are kept in good repair. In case any sidewalk shall be in a dangerous or defective condition he shall serve a written notice upon the owner or owners of the lot or lots abutting on said sidewalk to repair the same within twenty-four hours. In case the said owner or owners shall fail or refuse to repair said walk within the time specified in said notice the inspector of sidewalks or other duly authorized officer shall at once perform said work and report the cost thereof, together with an itemized statement of the material

used, under oath to the city council; whereupon the same shall be assessed against said lot or lots as provided by law. The said owner or owners shall also be liable to a fine of not less than one dollar nor more than ten dollars for each day he shall neglect to make said repairs after receiving said notice.

1109. It shall be the duty of all policemen to take note of all defects in sidewalks, and, when out of repair, notify the owners or occupants of premises in front of which said sidewalks are, and also to report the same to the inspector of sidewalks; and in case of accident they shall report the same to the city attorney, together with the names of any witnesses to said accident if known to them.

1090. It shall be unlawful for any person or persons within the city of Lincoln to construct or maintain any cellar-way,
110 window or door, area, or entrance to any basement in or through any sidewalk in said city of Lincoln of greater width than forty-eight inches from lot line, and all such cellar-ways, windows, or doorways and entrances shall be securely guarded by strong iron railings or gratings. Areas about windows opening through the sidewalk immediately adjacent to buildings and where it is necessary to admit light and air to basement shall be protected and covered by strong iron gratings, the bars of which shall not be more than one inch apart, and so constructed that the same may be walked upon with safety and of sufficient strength to hold any weight that would come upon the sidewalk at that point, or shall be protected by iron railing as provided in case of cellar-ways. All hatchways, bulkheads, or openings of any sort through sidewalks at a greater distance than four feet from the front lot line shall be provided with strong iron or iron and glass coverings, with a rough surface to prevent accidents, and the entire construction of said areas, hatchways, entrances, and openings shall be subject to the direction and supervisions of inspectors of sidewalks or such other persons as the city council may designate.

Dr. N. J. BEACHLEY sworn and testifies:

By BURR:

Q. Doctor, what is your profession?
A. I am practicing medicine and surgery.
Q. How long have you been engaged in that profession?
A. Since 1854.
Q. Are you acquainted with the plaintiff in this suit?
A. No, sir; I never saw her to know her until yesterday; no further acquaintance.
Q. You met her yesterday?
A. I saw her here in court and met her last night.
Q. At Mrs. Gosper's house?
A. Yes, sir.
111 Q. Did you make an examin*y*tion of her foot?
A. Yes, sir.
Q. You may state to the jury how you found it.

A. Well, I saw the foot, and the indication was that she was injured in the metatarsus articulation.

Q. Can you explain fully to the jury from this foot or skeleton where it was that you found she has been injured?

A. Yes, sir; the injury to this articulation (witness indicates)—this had been involved, and particularly the metatarsus articulation. It is what is ordinarily termed a bad sprain.

Q. In the course of your practice have you met with bad sprains or wrenches in that place?

A. I have.

Q. Occurs pretty frequently?

A. Yes, sir; to the foot and ankle.

Q. Well, how badly is her —? State fully the condition of her foot.

A. Well, from the appearance at present I would judge that when she was injured there was more or less bruise of the articulating surface, which when the injury occurs produces blood oozing between the cartilage and the bone, but of course in small quantities. If the foot os kept quiet and properly treated at the time it usually gets well in a short time.

Q. In what length of time?

A. The short time I would consider safe to say would be six weeks; from that to two months. I would not want a person to do anything of a serious nature—to undertake to use the foot in any less than six weeks. If the foot is not used this blood may be practically absorbed by nature by the absorbants; but if the foot is used and pressure brought to bear by using the foot and pressing the ends of the articulation together, then you keep up that flow of blood and bring about that condition which will finally end in chronic inflam-ation, as her condition is at the present time, and swelling, and may end in the destruction of the bone by
112 car-es of the bone.

Q. What is that?

A. It is a bruise in the first place, and then if that bruise is irritated from time to time car-es of the bone follows, pus forms, and then the bone decays.

Q. How serious will that destruction be?

A. That may be various; if there is rheumatic or scrofulous trouble in the system the bone may be entirely destroyed and cause the patient the loss of the limb.

Q. Can you tell from the present examination of the foot what was the injury in the first place?

A. Only judging from the condition I find, would indicate that it was a bruise of the articulation and the cartilages.

Q. What was the result upon the ligaments that held together the small bones or articulating bones?

A. They may have been torn some or badly sprained. I could not say certain as to whether they were torn, but probably were from the character of the injury.

Q. If you had of had the patient at the time of the injury you could have told whether they, the ligaments, were torn or not?

A. Yes, sir; I could at the time.

Q. With proper care and treatment what would be the result of that injury?

Objection. Overruled. Exceptions.

A. Why, with proper care and treatment the foot ought to have been well before this time.

Q. Was there any fracture of the bone?

A. No, sir.

Q. Or any bones?

A. No indication.

Q. With no fracture of the bone ought not this injured foot, with proper care and treatment, become a very good foot?

A. I think if the foot had had the proper care and rest at
113 the *the* time the foot would be well.

Q. What kind of rest would you say to the jury she ought to have given the foot and what would be the proper treatment?

A. The proper treatment would be hot water, hot applications, and keep the foot elevated, with rest; absolute rest.

Q. And keep it elevated in what manner?

A. Either by lying upon the bed or sitting in a chair, to have it rest on a stool.

Q. Suppose the patient lived in the second floor of a residence, where she would go up and down the stairs with a crutch and cane, and suppose she was injured upon Friday and on the following Monday commenced the regular customary work and went up and down these stairs, getting into a buggy, riding four or five blocks in the buggy, getting out of the buggy, and walking with a cane or crutch into a store and attending her duties in the store during the day and keep up her duties regularly, and while attending to her duties in the store in the millinery business she would keep her foot resting upon a level with her body when she was sitting down. What would be the result?

A. Whenever an injury of this kind occurs and the patient puts the foot in a dependent position that increases the blood flow, and when you increase the blood flow you increase the inflam-ation. The authorities and experienced teachers advise keeping it in absolute rest.

Q. What would be the result of walking with a crutch and a cane?

A. Increases the inflam-ation every time. For instance, if I have a blood blister on my finger and I pinch it that day, if it is partially absorbed one day and I keep pinching it I irritate it and it becomes worse and the inflam-ation gets a little more extensive and
takes longer to subside, and it is just the same with a blood
114 blister under the cartilage on the foot as it is with the blood blister on the finger. When you increase the pressure you increase the inflam-ation.

Q. The pressure of a crutch and cane under the arm would communicate to the foot?

A. The depending condition of the foot would increase the inflamed condition.

Q. Are you acquainted with any of the standard works on surgery that treat of such an injury?

A. I am. Yes, sir.

Q. What is that?

A. Thaer's Work on Orthopedistical Circulation.

Objection, as immaterial, incompetent, and not admissable under the pleadings. Overruled.

Q. State what page treats of this kind of an injury.

A. It is marked there, and on that page you will find it.

Q. Is that recognized among your profession as a standard authority upon the subject which it treats?

A. It is. You will find this referred to on page 168.

Q. Doctor, taking this injury which this patient received, was it, in your opinion, of such a nature at the time the injury occurred under proper care and treatment as would result in permanent injury to the foot?

A. Not from what she stated — me the condition of the foot was.

Q. Have you treated like injuries?

A. Yes, sir.

Q. With what result?

A. With good result.

By DEWEESE:

Q. When was it you first examined this foot?

A. Last evening.

Q. Yesterday evening?

A. Last night at eight o'clock.

115 Q. You had never seen or knew anything about the patient before?

A. No, sir.

Q. Now, different injuries are not equally severe, are they?

A. O, no.

Q. Some are slight and some are more severe, as a matter of fact?

A. Yes, sir.

Q. You don't know, as a matter of course, whether this was just the same accident or injury to the ligaments as may have been in the case treated by you?

A. I could not state that I had had one just exactly like this, because I did not see it when it was injured. I simply judge from the condition I see and her statements.

Q. The condition of the system and the general health of the person would have some effect on any injury a person receives?

A. A young person with an injury of that kind will get well much quicker than an old person, and a person of scrofulous or rheumatical tendencies or constitution might end, as I stated, in a short time with car-es of the bone.

Q. That is, rottening of the bone?

A. Yes, sir.

Q. Scrofula may have that effect?

A. Yes, sir.

Q. So that different injuries to different persons, even to the same extent, would not result the same by the same treatment?

A. No, sir.

Q. Whether an injury would heal up in six weeks or two months or three months would depend very much on the condition of the system, the age of the person, and more especially upon the real extent of the injury?

A. The extent of the injury would have a good deal to do with that, as well as the age and condition of the system of the person.

Q. When you examine this foot yesterday evening did you find she is still suffering from chronic inflam-ation?

116 A. Yes, sir; that is what I stated; her foot was swollen.

Q. Did you say that had resulted in car-es of the bone?

A. I did not say it had; I said chronic inflam-ation.

Q. What did you say about the probability of car-es of the bone?

A. Did not see any indications of the bone decaying, although the articulations are very sensitive.

Q. The mobility or use or readiness with which it moves or can be moved by her hand at the articulations of these bones compares with what respect with the other foot, did you observe; how is that?

A. There is not so much mobility on account of the chronic inflam-ation.

Q. What does that indicate?

A. It indicates that there has been an injury of some extent—considerable extent.

Q. How, if this patient, if she received the treatment—the hot-water applications—you spoke of, then she was properly treated?

A. Yes, sir; if she received that kind of treatment and kept her foot in an elevated position and gave it absolute rest, then she was properly treated.

Q. You would not prescribe or require a patient in trying to get this sole rest to keep in any one position absolutely for six weeks or two months?

A. No, sir.

Q. In order for any injury to the body to heal the whole body wants to be kept in a healthy condition, does it not?

A. It should be as much as possible.

Q. Is not some reasonable movement of the body better than absolutely one position?

A. It is, but it should not be done at the expense of the injured member.

Q. The foot itself should not be used?

A. No, sir.

117 Q. But did you ever know a patient—is it practicable, where an injury happens to well persons or reasonably well, that they should not be moved about the room or make some movement? Is that improper?

A. Not improper where they do not use the foot.

Q. Some little movement is absolutely necessary?

A. It is well if they can take exercise and not injure the part affected.

Q. Now, if the patient left her room the fourth day from the time of the injury on crutch and cane without using the foot in any respect, except to let it hang down, once a day and return at night and keep the foot elevated within a few moments after leaving the room, even, with her body in a sitting position, and also keep up the hot-water applications and other medical treatment prescribed for such an injury, would you say that was anything unreasonable?

A. Not if she gave the foot proper care.

Q. If, as a matter of fact, this same foot and patient is afflicted nearly two years since that, as you now see she is, would you say that injury she received there was in all probability of a permanent nature?

Q. Well, the chances are much less of her getting well to-day than the day she was injured.

Q. That is your opinion. Do I understand you to mean that the foot has now a chronic inflam-ation—that the injury has resulted in a chronic affliction that makes it more probable of a permanent injury than you could have prognosticated at the time of the injury?

A. Yes, sir.

Q. This fact may not result from any one cause? In other words, is it not true it may first result from the extent of the injury, coupled with the fact of her condition and age?

118 A. I do not think the chronic inflamed condition ought to have followed from her age with proper care when it was first injured.

Q. Isn't it true that your most positive opinion about the recovery of a petient in certain treatment often proves incorrect; in course of time do not your patients fail to recover when your firm opinion was they would recover?

A. Yes, sir; that is true.

Q. There is nothing absolutely certain and perfect in medical treatment, nor absolutely certain as to the effect of an injury upon a certain person?

A. No, sir.

Q. No positive rule?

A. No, sir; we consider the exception proves the rule.

Q. You have given your opinion, having in mind as a basis a certain kind of an injury; as she was injured in May, 1889, you have tried to form a certain kind of an injury to a certain extent, and now having examined her foot yesterday base your opinion upon that.

A. I base my opinion on her being able to go to work on the 4th day subsequent to it, and having gone regularly on from that.

Q. As a matter of fact, you don't know how badly her hurt was at that time?

A. No, sir.

Q. All that you really know of your own knowledge is what you observed from your examination yesterday?

A. Yes, sir.

Q. Whenever this car-es of the bone sets in can it ever be checked?

A. Yes, sir.

—. ——.

A. If car-es sets in and the matter is removed early and the diseased bone removed early — can be sometimes checked.

Q. That would necessitate the removal of the bone itself?

A. Not the entire bone.

119 Q. So that if car-es of the bone should set in the result might be the loss of the limb?

A. Yes, sir; the loss of the limb or of one of the individual bones.

Q. And the indications for that are stronger now than they probably were soon after the injury occurred?

A. I do not see any indication particularly of car-es there, but the soft tissue around the ligaments; the synovial membrane seems to be thickened, inflam-ation—chronic inflam-ation—existing.

Q. You may state in regard to this kind of an injury so long as it exists; how it affects the person, if you know from your experience.

A. In the first place, a bad sprain is worse than a simple break—so considered by the best authorities, and they freely concur that a bad sprain is worse than a break of the bone, because the bone will unite and become stronger than a bad sprained ligament or synovial membrane will.

Q. Now, you mean to say that if the foot had been broken it could have been attended to and healed more readily than the bad sprain of the ligaments?

A. If these bones were broken without crushing, either of these bones or more than one broken without tearing or lacerating the tissue, it would not be so bad as the straining of the ligaments and the bruising of the articulations; not so likely to receive an injury as the one from which the patient is suffering.

Q. When these ligaments are torn loose so as to sever this synovial membrane from the bone, what will likely happen?

A. The ligaments are liable to elongate; will not become so short.

Q. In this particular case, Doctor, finding the patient in the condition she is nearly two years after the accident happened, what would you say as to the probability of that injury lasting during her life?

120 A. Not her age; maybe will. She will not suffer unless these ligaments were torn, and in uniting they have become elongated; then it would leave it weak.

Q. Cannot tell from your examination?

A. Could not.

Q. Then is it not true that if these ligaments were left in such condition that they would heal at all, so as to leave the person as well as before, that would have occurred before?

A. They heal very slowly, and where the foot has not had the

proper rest it would be a long time, and more likely never be so as when proper care and attention was given in the first place.

Q. So in reference to their suffering and in reference to the effect of the injury at different times depends somewhat on the changes of the weather and the seasons and the condition of the system?

A. In an injury of this kind or character very often people become somewhat more or less rheumatic; then they feel the effects of the weather. Unless there was some rheumatic trouble or pain it would not change with the weather.

Q. Would that injury tend to produce rheumatic trouble?

A. Yes, sir.

Q. Suppose, Doctor, that this patient does not get well, improve in the future from this time on, what will be the result—what will be the effect?

A. If her foot does not improve from this on it would remain in a crippled condition, as the foot is now swollen and boggy and tender upon pressure. It *it* would always remain that way; she would be a *crip* cripple for the rest of her life.

Q. Would it remain the same if it does not get better? Will it not get worse?

A. It would depend upon her, whether she abuses it or not. Her foot would be more easily injured.

121 Q. So she must constantly be on guard in reference to the foot?

A. Very little strain or fall to injure that foot much more than the other with the same amount of force applied.

Q. How long, from your examination, is that foot to remain in that condition, considering the time it was hurt, nearly two years ago?

A. That depends entirely upon the treatment of the foot.

Q. With proper care and attent-on?

A. I could not say. I have seen persons who have bad sprains of their foot continue and remain lame for five years and then get well. I could not say it is going to last that time or get well in a few months. As I have said, her own care of that foot will have a good deal to do.

Q. Is it not true that that foot will always be more easily hurt than if it has never been hurt, however well? Taking the most favorable view of it now, won't it necessarily always be a weak foot, as compared with the other, and always liable to injury from a little accident?

A. Probably a little more subject to injury than the other foot.

Q. So that injury will run with her life, with that view?

A. To some extent.

By BURR:

Q. If the ligaments had been torn loose from this foot at the time they were injured of Friday night, could this lady have gone to work on the following Monday morning at the store?

A. There might have been a slight rupture and she could have gone.

Q. If there was a slight rupture and she went on crutch and cane, what would have been the effect upon the tearing of these ligaments?

A. My answer was to that, that when she placed it in a dependent position she increased the blood pressure, and whenever she increased the blood pressure she increased thein flam-ation.

122 Q. The breaking of the two bones would not have been as serious an injury?

A. Not as serious an injury. The tearing of the ligaments is a severer one.

Q. Then it would require more care with the broken ligaments than with the broken bones?

A. Yes, sir.

Excused.

Dr. EVERETT sworn and testifies:

By BURR:

Q. What is your business?

A. Physician and surgeon.

Q. How long have you been such?

A. 21 years.

Q. Are you acquainted with the plaintiff in this suit?

A. I am not.

Q. Did you ever examine her foot?

A. Yes, sir; three or four days ago.

Q. Did you learn how it was injured?

A. Yes, sir; I did.

Q. And the time when it was injured?

A. Yes, sir.

Q. From the examination you made and from what you learned of it you may state to the jury what the injuries were at the time they occurred.

A. I understood it was a sprain of the foot—of the middle of the foot.

Q. How badly was it sprained?

A. I had the impression it was a pretty bad sprain.

Q. From the examination could you tell whether the bones had been injured or not?

A. Could not.

123 Q. Could you tell whether the ligament had been broken or severed?

A. Not from the examination.

Q. What sort of treatment would you say that the injury should have received?

Objection overruled. Exceptions.

A. Rest would be a large feature of the treatment.

Q. What do you mean by that?

A. Putting the foot in absolute rest, so that there is no motion whatever.

Q. What parts of the foot were involved in this injury?

A. From the toes back to the center of the foot; perhaps a little further, judging from the present condition and what I learned from statements of the plaintiff.

Q. What result would it have upon the injured parts of the foot to have the patient stand up and let it hang down without letting it rest upon the ground?

A. That depends whether there was support to the part or not; if it was firmly bandaged it would aid it.

Q. Suppose the patient would walk up and down stairs with a crutch and came within two days after the injury and keep it up continually?

A. I would not think it would help it any.

Q. Would it be that good treatment it ought to have?

A. I will say not.

Q. The action of a crutch under the arm and the use of a cane going up and down stairs at least twice a day with no support to the limb other than hot bandages on it, would that be that sort of treatment?

A. I would not be prepared to say the crutch and cane would hurt it.

Q. The motion going up and down stairs?

124 A. Do not think that would hurt it.

Q. If the ligaments to the bones of the instep had been lacerated or torn so severe, then, there should have been absolute quiet and rest for the foot, and the patient should not have stood up for any length of time?

A. No, sir.

Q. And if she did stand up and hang down the foot, it was not that proper care and treatment it should have received?

A. No, sir.

Q. Will you explain to the jury and court what the result would be of using the foot so soon after the injury—to stand up and walk round?

A. I think it would delay the repair by the inflam-ation that it would tend to produce.

Q. Keep up a constant irritation?

A. Yes, sir.

By DEWEESE:

Q. I am not sure you understood the question that Mr. Burr asked you in saying she continued to walk up and down stairs. In the first place, suppose she did not use her foot at all and was assisted by other people and only went down once a day and back—one trip in twenty-four hours—and when down, or a few moments thereafter, kept her foot elevated and treated it, as directed by her physician, with hot bands and hot applications, would you not say that was a proper treatment, or would you say that was an improper treatment or necessitated any improper results?

A. It would not improve it—any motion of that sort.

Q. Do you mean to say that a patient should not be permitted to move?

A. Move all that is absolutely necessary. A severe sprain of the foot should be treated with absolute rest, if possible; anything else is injurious, whether slight or not; the mere motion would result in injury.

125 Q. Some sli*g*t motion is necessary to have good health?

A. Better let the general condition of the patient suffer a little and look to the foot that is injured.

Q. This laceration of the ligaments or laceration is worse than the breaking of a bone?

A. Yes, sir.

Q. From your examination of the patient a few days ago, did you still find her laboring under this injury?

A. Yes, sir; I did, or some injury received.

Q. The treatment in such an injury was the hot applications—both the use of hot water and bandages and keeping the foot elevated on a stool or chair when in a sitting position?

A. Well, it should be continuous, not intermittert—should be continuous.

Q. And hot applications should be put on and on?

A. For a certain length of time—after a certain course of time.

Q. Are these hot application- to generate the circulation of the blood?

A. They are to permit the return circulation of the blood.

Q. To keep the foot warm?

A. No, sir; it is usually too warm—delays the vessels.

Excused.

Dr. M. E. JONES sworn and testifies:

By STEARNS:

Q. Doctor, you are a resident of this city?

A. Yes, sir.

Q. You know where this property is that has been designated as the Jones property?

A. Yes, sir.

Q. You are familiar with it?

A. Yes, sir.

126 Q. Any interest in it?

A. It belongs to me. I guess that is some interest.

Q. Doctor, you have heard the testimony about the time the accident occurred?

A. Yes, sir.

Q. How long prior to this accident was you around these premises--around this areaway and hole in the sidewalk?

A. About a week before I saw this grate down in the hole, and I was alarmed; there were a number around. I said, What is the cause of this being an empty store? No one had a right to it; could get no satisfaction from any one; tried to lift it up myself and failed. It was very heavy.

Q. How heavy?
A. 150 to 200 pounds; pretty heavy; hard to lift, but I replaced it.
Q. How far apart are these bars?
A. I could not say.
Q. Tell what you did.
A. It is a very heavy grate, such as they all are along that sidewalk; all the same kind, and are in accordance with the requirements of the city. I replaced it and thought no more about it. In about a week after I received a little notice asking me to come over to the store—something he wanted to tell me about; saw the same thing existed again. It was broken.
Q. How much broken off?
A. About one-third.
Q. What is its shape?
A. Semicircular.
Q. One corner broken off?
A. Yes, sir; a few of these fellows came out and stated a lady was hurt. I went immediately onto O street and employed a carpenter, Mr. Consaul, to repair——

Objection by court. Exceptions.

127 Q. How many of these grates along this sidewalk?
A. Four in front of my building. Marquette has four more.
Q. Where is this grate located?
A. Just south of the entrance going into the building.
Q. How far from the building?
A. Close up to the building.
Q. How wide is that sidewalk?
A. Regular width—24 or 25 feet.
Q. About how far is it from the tree near there?
A. Could not say; never measured it; could not really tell.
Q. Give your best judgment.
A. I should think, perhaps, about ten feet.
Q. How much space is there left on the east of that tree on the sidewalk?
A. About 15 feet, I should think—wide enough.
Q. Are there any steps near this place leading up to the building?
A. Yes, sir; steps on both sides.
Q. How far out does this grate extend from a line drawn from one step to the other?
A. Just about eight inches.
Q. Look at this and state if it is a fair representation of the grate and steps.

Map of the part of the sidewalk in question introduced in evidence and marked "Ex. A."

A. Yes, sir; I had it done by an architect in the city.
Q. Representing the relation of the grate to the steps on the sidewalk?

Objection that it is not a true and correct map, incompetent, and immaterial.

Q. Dr. Jones, do you know whether this is correct or not?
A. I think it is. It is not my signature. I believe it is correct.

128 By HALL:

Q. Did you make these measurements?
A. I did not.

Objection overruled.

By STEARNS:

Q. You may state, Doctor, if from the knowledge you have of the locality down there of the premises this is substantially correct.
A. Yes, sir.

Objection, incompetent. Exceptions.

Q. Did you see this plaintiff any time after the accident?
A. Yes, sir.
Q. What is your profession?
A. Physician.
Q. How long have you been practicing?
A. Since 1860.
Q. Graduate of any school?
A. I am of the——
Q. Where did you see the plaintiff?
A. At Mrs. Gosper's house.
Q. How long after the accident?
A. Coul*d* not tell the exact time. Mrs. Gosper drove to my house and informed me some lady had fallen in an areaway and wanted to talk to me about it.
Q. About how long after the accident?
A. A week or ten days.
Q. Did you see the plaintiff yourself?
A. Yes, sir.
Q. Did you make an examination of the injury at that time?
A. Yes, sir.
Q. In what condition did you find the plaintiff's foot at that time?
A. Quite badly swollen, red; complained of some pain; evidently there was considerable inflam-ation in the foot.

129 Q. Where did you find the plaintiff?
A. Sitting in the room at Mrs. Gosper's residence.
Q. Did you see her at the store?
A. No, sir.
Q. Was you there in connection with any other physician?
A. I think Doctor Hart was in attendance; and afterwards had a conversation with Dr. Hart in regard to it.
Q. From your examination of the injury at that time, what would you say was involved?

A. Very difficult matter to state; at that time it was so inflamed it was very hard to point out the particular points of the foot.

Q. What would you say was the proper treatment for that kind of an injury?

A. Absolute rest is the first thing.

Q. What do you mean by that?

A. Stay in the house.

Q. What would you say as to the climbing up and down stairs, riding in the buggy, and walking into the mil-inery store during the day—what effect would it have upon an injury of this kind after it exists?

A. I think it is a great damage; great injury.

Q. In what way?

A. It keeps up the inflam-ation—the exercise does.

Q. What effect does continued inflam-ation have upon the part?

A. It will create a chronic condition of things.

Q. Then, to permit the inflam-ation to exist would result in permanent injury when otherwise there would be none?

A. Yes, sir.

Q. Did you make more than one examination?

A. I think I was there two or three times in connection with Dr. Hart. I found him in attendance.

130 Q. What applications should be made upon an injury of that kind immediately after it is received?

A. It is conceded that the best treatment is hot or cold water, as most agreeable.

Q. How long should application be made to an injury of this kind? How long should they be kept up?

A. Used until the inflam-ation is allayed, as long as inflam-ation exists.

Q. But on the supposition that the limb was not receiving the perfect rest would you keep up that treatment?

A. I think the treatment without perfect rest would amount to very little.

Q. Do you know of your own knowledge who removed this grate?

A. I do not.

Q. Did you know it before you went around there?

A. It took me two weeks to find out.

Q. Did you authorize any one to take it out?

A. No, sir; why certainly not.

Q. Was the city of Lincoln using it to your knowledge?

A. No, sir.

Excused.

W. D. Cox sworn and testifies:

By HOLMES:

Q. Did you reside in the city of Lincoln in the latter part of May, 1889?

A. I did; yes, sir.

Q. What was your business during that time?

A. Running meat market on the corner of 12th and P.
Q. In the Jones block?
A. Yes, sir.
Q. How many store-rooms in the Jones block?
A. I think four.
Q. You was in the corner, north?
131 A. Yes, sir.
A. Who was next to you on the south?
A. A part of the time there was a wholesale meat market—Reynolds & Davis—and a Mr. Herdman and my brother has a confectionery store.
Q. And the next one was vacant at that time?
A. I think so; yes, sir.
Q. Is there any areaways around your store-room?
A. Yes, sir.
Q. Was there a -tairway going down into the cellar on the north side of your room, or was there any stairway or areaways on the east side of it—on 12th street?
A. No, sir.
Q. How many areaways or light-holes along there?
A. I could not say; I think there is three or four.
Q. In what condition were they?
A. Well, in good condition as far as I know.
Q. All covered with an iron grating?
A. Yes, sir.
Q. Are you acquainted or did you see a man deliver ice along there?
A. Yes, sir.
Q. To the ice-cream stand?
A. Yes, sir.
Q. Was it Mr. Herdman kept that?
A. Yes, sir.
Q. What did he do with that ice?
A. Threw it down one of these areaways.
Q. How large were the pieces he threw down?

Objection by the court. Defendant excepts.

Q. Did you see this man deliver ice there?
A. I did, sir.
Q. How did he get this ice down through this sidewalk?
A. Well, sir, he first undertook to take out the grate, but it
132 slipt down in the hole and then he threw the cakes of ice in while it was down and broke it.
Q. Where was you standing?
A. Could not say exactly; not more than fifteen feet in front of my place of business.
Q. Do you recollect of a lady being injured a short time after that?
A. I heard of it.
Q. Can you tell the jury how long before this lady was injured that fellow broke the grate?

A. My recollect is, four or five days.
Q. That is your best recollection?
A. Yes, sir.
Q. Could not have been longer than that?
A. No, sir.
Q. Have any conversation with that fellow when he broke it?
A. I do not know what conversation. He said he was afraid the company would find out about it.
Q. Who was he working for?
A. The Lincoln Ice Company.
Q. Do you know whether there is a tree growing in that neighborhood?
A. Yes, sir.
Q. How far is the nearest tree—shade tree—to this grate?
A. You mean to the grate of the building?
Q. Nearest the building.
A. I would say it is five feet, if not more.
Q. How long was you in this store after and before that time?
A. I was there from the 5th day of December, 1888, to the 4th day of June, 1889.
Q. 12th street, in this city, at that particular point is not the busiest part of the city—of the busiest portion?
133 A. It would not be considered the most busy street of the city.
Q. It is off from the main travel?
A. A little; yes, sir.
Q. Do you know about the lights that were kept there at that time?
A. I believe there was an electric light there at that time; not at that immediate point, though.
Q. What sort of a light do you know the ice-cream parlor had?
A. Why, I think they kept a gasoline torch burning.
Q. Where was that?
A. Just north of this grate.
Q. How late did that burn evenings?
A. I went home at nine o'clock; I could not tell how long after that.
Q. Generally, how was the sidewalk lighted there?
A. Well, there was more light on that side than on the other.

By DEWEESE:

Q. You don't know how that was toward ten o'clock?
A. Not any evening except Saturday evenings.
Q. You were occupying that store north of Herdman?
A. Yes, sir.
Q. This grate you spoke of, before it is broken is larger than the hole is, and extends out and rests on a little base on the outside of the hole?
A. It sets down even with the plank of the sidewalk.
Q. A little panel or groove around to catch the iron?
A. Yes, sir.

Q. Before it was broken it could not go down?
A. Yes, if it was raised up; after it passes a couple of inches it is all clear.
Q. A couple of inches?
A. The sidewalk is all clear underneath.
134 Q. But the grate is forty inches one way and twenty-four the other?
A. I do not know.
Q. Do you know whether—how long was it after the accident you heard of it?
A. Next morning, I think.
Q. You did not see the accident?
A. No, sir.
Q. Next morning you heard of it?
A. Yes, sir; that is all I know about it.
Q. What month was that?
A. May, 1889.

Mr. BURR:

Q. Did you hear of this accident to this lady the next day after she was injured?
A. The next morning. I know the party that told me was with the lady the night before.
Q. Was she hurt on Saturday night?
A. We were there on Sunday the same as on Monday. I could not say as to the day.
Q. You heard of it the next morning; you are sure you heard of it the next morning after the injury?
A. Yes, sir.

Excused.

SHERMAN COX sworn and testifies:

By HOLMES:

Q. Are you a brother of the witness who just left the stand?
A. Yes, sir.
Q. Was you in business with him in the Jones block in the spring of 1889?
A. With my brother? No, sir.
Q. Was you acquainted with the premises—the Jones block?
A. Yes, sir.
135 Q. Do you know anything about this iron grate that is here in dispute?
A. Yes, sir.
Q. Which one of these stores was you in?
A. In the confectionary store.
Q. How was that iron grating kept there on that place during the time that you was in the confectionary store?
A. It was kept closed most of the time; the last day or two was broke, I believe.
Q. Do you know any person who tampered with it?

A. They took it out to put ice down.
Q. Do you know the man who took it out?
A. His name was Henry; I don't know the rest.
Q. How many times did you know of his taking it out?
A. Could not say about how many times; about 12 or 15 times.
Q. How did he do it? Explain how he did it.
A. I could not tell; I never see him do it.
Q. You never saw him put the ice in there?
A. No, sir.
Q. Was this ice being delivered for your store?
A. Yes, sir.
Q. Was there a stair running from your store to the cellar?
A. Inside there was.
Q. To save taking the ice through the store you threw it down the areaway through the window?
A. He was to put in the cellar he put it in.
Q. Who kept that store?
A. Nobody.
Q. Vacant?
A. Yes, sir.
Q Do you know how that iron became broken?
A. Nothing only what I said.
Q. Did you ever see this iron grating when it was off the areaway?
136 A. I could not say whether I have or not.
Q. Did this iceman take it off and leave it off?
A. No, sir; I guess not.
Q. What was your duties in this store?
A. General work.
Q. If you stood at the store door of the ice-cream stand this would bring you within two feet of the doorstep?
A. Yes, sir.
Q. About two feet to the south of it?
A. Yes, sir.
Q. Do you know how far from the south end of this grating to the north end of the step south of it?
A. I should judge about 8 feet.
Q. The north end of the grate to the step just south?
A. About eight feet.
Q. Hardly that far?
A. May not be quite that far.
Q. How wide are those steps on the sidewalk?
A. I could not say.
Q. As you come out of the door of your restaurant you can see this grating?
A. Yes, sir.
Q. And you were there continually?
A. Yes, sir.
Q. How many times did you ever see that grating open?
A. I could not say.
Q. How many do you think?

A. I told you awhile ago 12 or 15 times.
Q. Do you remember that a woman was said to be injured?
A. I was not there then.
Q. You had gone away?
A. Yes, sir.

137 By DEWEESE:

Q. How long had you left before this injury occurred?
A. I left the 29th.
Q. And you had seen this hole open 12 or 15 times?
A. I presume so.
Q. How—about how many different days—12 or 15?
A. I should judge.
Q. And when the hole would be left open did you ever notice the grate, whether it was standing up opposite the house or what had become of it, or was it generally down in the hole?
A. Well, it was down in the hole after it got broke.
Q. And I suppose you did not take particular attention when the hole was covered over?
A. No occasion to pay particular attention; I used to walk over them.
Q. And when this one was covered over you would not happen to notice it?
A. I suppose not.
Q. The others were kept closed?
A. Yes, sir.

Excused.

L. J. BYER sworn and testifies:

By BURR:

Q. Mr. Byer, what official position do you hold in the city of Lincoln?
A. Street commissioner.
Q. Was you street commissioner in 1889?
A. I was.
Q. Are you acquainted and have you been acquainted with the Jones block?
A. I know where it is.
Q. And with the streets of Lincoln?
138 A. Not all of them.
Q. As such street commissioner was it your duty on behalf of the city to take charge of them and see that they are kept in a proper condition?
A. That is my business.
Q. About how many iron gratings and areaways are there in the city of Lincoln?
A. I haven't any idea.
Q. Did you have any notice of any kind that the area-hole or any area-hole in front of the Jones block, on 12th street, in this

city, was open or in an unsafe condition during the month of April or May, 1889?

A. No, sir; there was none brought to me or to my knowledge; no complaint of it.

Q. Or did you know of any such thing or defect or condition?

A. I did not.

Q. Or did the city of Lincoln or any of its officers know or have any knowledge that this iron grating was removed from that areaway and left in an unsafe condition?

Objection. Overruled. Exceptions.

A. Not to my knowledge.

By HALL:

Q. You recollect about having a conversation with me in referernce to this hole some time ago?

A. Yes, sir.

Q. A conversation as to whether you knew anything about that hole?

A. Yes, sir.

Q. You said you thought you served a notice on Dr. Jones to fix that hole?

A. No, sir; I did not say that.

Q. You don't remember that question.

A. Yes, sir; I remember you speaking about it.

139 Q. You remember you said you thought you had notified the property owner that you would look it up and see?

A. I might have told you I would look it up and see. I had no knowledge of it.

Q. You did not tell me that you had notified him that you would look it up.

A. I told you if I had notified him there was a record of it.

Q. Have you examined your record to see if you have any record of it?

A. Yes, sir.

Q. When did you make an examination?

A. After you and I were talking.

Q. How long ago?

A. Quite awhile ago.

Q. Any examination recently, just prior to being called here?

A. No, sir.

Q. You don't know what your record shows?

A. Don't show anything.

Q. When was you appointed?

A. 16th of April, 1889.

Q. Was you on duty at this time—the 31st of May, 1889?

A. Yes, sir.

Q. What is your official position?

A. Street commissioner.

Q. Have you the charge of sidewalks?

A. Yes, sir; together with an assistant.

Q. This 12th street is one of the principal streets of the city?
A. Yes, sir.
Q. You don't know whether any of the policeman knew this defect was there or not?
A. No, sir.
Q. You don't know whether or not any official knew about it or not?
140 A. No, sir.

Excused.

J. McCLELLAN sworn and testifies:

By BURR:

Q. Mr. McClellan, what official position do you hold in this city?
A. I am assistant street commissioner and work under Mr. Byer.
Q. Are you acquainted with the premises down on 12th street in front of the Jones block?
A. Yes, sir; I am.
Q. Could you tell the jury the distance from the tree that stands there—the nearest tree—to the iron gratingin which this accident is said to have occurred?
A. The distance from the building or boundary line of the lot is about seven feet and four inches.
Q. Do you know the size of that grate?
A. No, sir.
Q. What is the width of that sidewalk?
A. Twenty feet.
Q. And what is the correct breadth of the hole or areaway under this grate, from the sidewalk to the bottom of it?
A. Next the building it is 24 inches, and on the outside the farthe*r*est point of the grate is twenty inches.
Q. Did you ever have any notice of any kind from anybody that this grate was being removed from its place and leaving that hole in a dangerous condition?
A. No, sir; never did.
Q. Was you in office at the time this occurred?
A. I was in office until the 23rd of April, 1889.

Excused.

141 LOUIS OTTO sworn and testifies:

By HOLMES:

—. Mr. Otto, what official position did you hold in this city in the month- of April and May, 1889.
A. Police officer.
Q. Where was your beat?
A. In May, latter part of May, run from 10th to 12th and from O street to Q street.
Q. Did it take in the west side of 12th street between P & O?
A. Yes, sir.

Q. Are you acquainted with the premises in front of the Jones block?

A. Yes, sir.

Q. And at that time?

A. Yes, sir.

Q. Did you know about any defective or unsafe condition of any areaway or hole, iron grate, in front of the Jones block at that time?

A. I found a grate three or four times was not properly laid or laid on carelessly, and I moved it on again as good as I could, and being in the night I moved it as good as I could.

Q. When was that?

A. In the latter part of May; the last time I passed it was broken. It may have been five or six inches from the building; I laid it on as good as I could.

Q. Did you learn at any time of an injury to a person in this grate?

A. I heard it.

Q. And when was it you fixed this grate over the hole; was it before or after?

A. It was before.

Q. Do you know when this lady was hurt?

142 A. No; I do not know the date.

Q. How long was it before the injury that you fixed this grate?

A. It was two or three days before I heard of this accident. I think it was two or three days previous to that when I fixed it, and thought it was perfectly safe.

Q. That was before the grate was broken?

A. I laid it on three or four times, and the last time was two or three days previous to this accident. It was immediately after I had fixed it that the injury occurred.

Q. Can you give the jury the date when the grate was broken?

A. I could not say. I think it was the latter part of May; could not give the date; impossible for me to do that.

Q. Describe to the jury fully, Mr. Otto, how you fixed it and in the manner and way you fixed the grate the latter part of May—the last time before you heard of this accident.

A. When I came along in the evening I noticed the grate laid to one side of the hole and a piece broken off, and I went to work and shoved it over—laid it over the sidewalk four or five inches. I laid it over so it was perfectly safe to walk across, unless a person came up to the building and stepped in.

By HALL:

Q. Did it surprise you much when you heard some one had fallen in that hole?

A. It did, for I fixed it up every time I went along there.

Q. How many times?

A. Three or four.

Q. Was this in the night time.

A. Yes, sir.

Q. What was the shape of that iron grate.
A. It was half circle or half moon.
Q. What is it that holds it up?
143 A. As near as I can find a double floor or a layer floor extends three-fourths of an inch more out and makes a base for it to rest on.
Q. Now, Mr. Otto, how much of that grate was broken off?
A. Probably six or eight inches. I could not tell very well; it was night.
Q. Then you laid it back there over the hole in the sidewalk so that if a person should get over far enough it would tip down?
A. Have to get pretty close to the building.
Q. How close?
A. Within five or six inches of the building.
Q. They would not have to get off the grate?
A. I thought it was safe.
Q. Anything to hold it up next to the building?
A. No, sir.
Q. So to fall in you had to step over far enough to tip that way?
A. Certainly; you would have to go pretty close.
Q. How wide is that hole?
A. About three feet, I should judge. I could not say exactly. I know the grate was awful heavy.
Q. Who called your attention to that grate?
A. The second or third night the young man who had a confectionary store there.
Q. What did he say?
A. That hole when left open is dangerous for children, because they come close to the building and look into every store as they come along.
Q. When did you go onto that part of the beat?
A. The latter part of May—24th or 25th.
Q. Did you find it in that condition the first two or three nights?
144 A. After the first two or three nights.
Q. How long had it been in that condition before?
A. I could not tell.
Q. When you had your attention first called to it it was broken?
A. Not that night, it was not broken. After he called my attention to it I watched it and placed it right in its place.
Q. The grate was of such shape, and the hole, that after it was broken you could not put that broken piece so it would stay?
A. I placed just what was left over the hole.
Q. You could not fix it so it would stay in its natural place?
A. Yes, sir; I made it safe.
Q. Did you ever inform the street commissioner?
A. I guess I never did.
Q. Now, Mr. Otto, isn't it a fact you came to work there about the 15th of May?
A. No; I know it was later.
Q. When did you hear of this accident?

A. I could not say as to the date, because I was on there a week or more.

Q. The store building in front of which was this grate was empty?

A. Yes, sir.

Q. Good many trees along the sidewalk?

A. About the center of the walk.

Q. And do these trees obstruct the light on the sidewalk?

A. No, sir.

Q. Which side of 12th street is the gas or electric light?

A. Southwest corner of 12th and P.

Q. Which side of 12th street?

A. On the west side of 12th.

Q. Do these trees obstruct the light any?

A. It may in the middle of the summer.

145 Q. Along in May?

A. It might, but they always keep them trimmed high enough to give the light.

By BURR:

Q. How much would that iron grate weigh?

A. I should judge 125 or 150.

Q. After you fixed it did you try it?

A. Stepped on it for the reason that we have to examine the doors, and so I made it perfect- safe—for myself.

Q. How much do you weigh?

A. About 230.

Q. Did that iron — ever have anything to support it underneath it next the building until after it was broken?

A. Not that I know of.

Q. None of these iron grates do, do they?

A. Most of them set down in; some have iron bars across, and then *and then* the grating, but the majority are set in as this was set in.

Q. Hundreds of them in the city?

A. All that I have seen only those in the center of the walk; the other is very seldom seen.

Excused.

F. G. SHARP sworn and testifies:

By BURR:

Q. Mr. Sharp, where do you reside?

A. In Chicago.

Q. How long have you resided there?

A. About six months.

Q. Are you acquainted with the plaintiff in this action?

A. No, sir.

Q. Have you seen her in Chicago?

A. I have.

146 Q. Whereabouts have you seen her there?

A. I have seen her on the street and also the place where she is stopping; the place where she is boarding and rooming.

Q. Have you noticed her go to and from the street cars?

A. Yes, sir; to and from the carette.

Q. State to the jury the manner she would walk to and enter that car.

A. I saw her on one occasion enter the carette and she entered from the right-hand side behind; she stepped up into the carette without apparent effort that I could see.

Q. State the manner she went up the step of the carette.

A. She placed her left hand on the railing, lifting her right foot first and then her left up afterwards, then one step and then upon the platform; she did that without any apparent effort that I could see.

Q. And what would be the difference in the manner of her going up these steps and from every other person that goes up the steps?

A. No difference that I could see except that she went a little slower than other people would.

Q. Did you say you saw her at her home?

A. Yes, sir; I saw her at her home.

Q. How was her movement upon her foot at that place?

A. Why, I only saw her on one occasion; most of the time she was going out of the building, walking on the street. I followed one block behind her and watched her movements. She carried a cane; with an almost imperceptible limp; don't think I should have noticed the limp if my attention had not been called to it.

Q. What use did she make of the cane?

A. She did not seem to use it very much for any purpose; did not seem to put much weight on it.

Q. Which hand did she carry the cane?

A. Right hand.

Q. Would she use the cane at the same time she let her
147 foot come down?

A. Yes, sir.

Q. Did you ever see her in any rapid movement?

A. I did in the hallway upstairs, going from one end of the hallway to the other.

Q. How fast?

A. Well, it was not a rapid run, not a jump run, but it was very quick step.

Q. At that time did she have a cane?

A. No, sir.

Q. Did you ever see her at any other time?

A. I saw her get off the carette one morning—that was on the 22nd of December last—I saw her get off the carette and saw her walk to where she was working, D. B. Fisk's.

Q. How long ago was that?

A. December 22nd.

Q. How was her walk at that time?

A. It was similar to the other occasions a few days before, with a very slight, almost imperceptible, limp.

Q. Did you ever see her at any other time in a rapid movement?
A. No, sir.
Q. When did you see her walk the last time?
A. That was the time I spoke of, December 22nd last. I saw her walk a block, perhaps a little less; saw her get off the carette at that time.
Q. Do you know what she was working at there?
A. Not of my own knowledge.

By HALL:

Q. How did she generally go from her place of residence to her place of business; ride or walk?
A. She walked a block and a half and then took the carette and rode within a block of her place of business.
Q. Could she get a car nearer than that?
148 A. No, sir.
Q. She was walking the shortest distance possible to get it?
A. Yes, sir.
Q. Where do you live?
A. Chicago.
Q. How long have you lived there?
A. Six months.
Q. What do you do?
A. I am clerk in a law office.
Q. Whose law office?
A. Willard C. Smith.
Q. Who formerly lived in this city?
A. Yes, sir.
Q. How long have you been in the detective business?
A. I have never been in the detective business.
Q. Do you mean to say to the jury you were not watching this lady?
A. Yes, sir; to that extent I have been a detective.
Q. Did you not tell in what capacity you came to her sister's house as a boarder?
A. Never had a conversation.
Q. You took a room in her sister's house.
A. I did.
Q. Took the room for the purpose of espying the acts of her sister?
A. Yes, sir.
Q. For how long?
A. A week.
Q. At whose solicitation did you go there?
A. Mr. Smith's.
Q. Who is Smith?
A. Willard C. Smith.
149 Q. At whose solicitations did he send you?
A. At the instruction and request of Mr. Holmes.
Q. Were you subpœnaed in this case?
A. I came under the advice of Mr. Willard C. Smith.

Q. Are you one of the attorneys in this case?
A. No, sir.
Q. On how many different occasions did you see this plaintiff walk from her boarding-house to the carette?
A. Two occasions.
Q. Walking fast or slow?
A. At a moderate gait.
Q. And how often did you see her walk from the carette—from where she left that—to the place she worked?
A. I saw her walk once from the carette to the company's place, and from the company's place to the carette.
Q. Did she use a cane?
A. Yes, sir.
Q. Now, Mr. Sharp, how did you happen to remember with which foot she stepped up into the car?
A. I was instructed by Mr. Smith to pay particular attention to that.
Q. Which side of the car did she get on?
A. The right-hand side—back.
Q. How far was you from her?
A. About twenty feet.
Q. Following per?
A. Yes, sir.
Q. How much are you to get for your services in this case?
A. Why, my time is to go on in the office. I am getting $15.00 a week at the place where I work. I am getting my expenses.
Q. Who pays your expenses?
A. Mr. Smith made arrangements. He has been employed by Mr. Holmes to look after some evidence.
150 Q. So you get your $15.00 a week and expenses for your services in this case?
A. Yes, sir.
By BURR: Do you know what compensation Mr. Hall is to receive out of this case?

Objection by court.

Excused.

Mrs. BOWERMAN sworn and testifies:

By BURR:

Q. Mrs. Bowerman, where do you reside?
A. In Chicago.
Q. Are you acquainted with the plaintiff, Miss Power?
A. Only by sight.
Q. Did you ever see her in Chicago?
A. Yes, sir.
Q. Whereabouts?
A. At Fisk's millinery store.
Q. About how many times have you seen her there?
A. I saw her there one afternoon.

Q. When was that?
A. The last week in October.
Q. Did you see her walk in then and walk around the salesroom?
A. Yes, sir.
Q. She waited on you?
A. Waited on a lady friend with me.
Q. How was her walk?
A. We could not discover that she was the least bit lame.
Q. How much did you see her walk?
A. She walked from the work-room into the salesroom, which was adjoining.
Q. Did she have any knowledge then that you were observing her walk?
A. No, sir.
151 Q. Can you tell about how far you noticed her walk?
A. I don't think I can; she walked around the room as she was talking about hats with this friend of mine.
Q. Did she limp?
A. Not at all; not that we could discover. We discussed it after we left the store.
Q. Did you see her take any turning movement on the left foot?
A. No, sir; not particularly.
Q. State if you observed her turn around.
A. I don't know that she turned right around.
Q. Did she twist around on the ball of the foot?
A. I did not observe it if she did.
Q. During all of the walk that you saw her make there or turns that she made you may state whether or not she limped during that walk.
A. No, sir.
Q. How long do you think you observed her walking?
A. She stood some of the time we were there, perhaps eight or ten minutes.

By HALL:

Q. What relation are you to Doctor Jones?
A. A sister.
Q. Who sent you?
A. I went at my brother's suggestion.
Q. You went to see this lady?
A. Yes, sir.
Q. When was that?
A. The last week in October.
Q. Did you purchase anything of her?
A. Did not speak with her at all.
Q. Did your friend state what her business was?
152 A. Said she thought of buying hats.
Q. Did she buy any?
A. No, sir.
Q. You got her to go along with you?
A. Yes, sir.

Q. How long were you in there?
A. Eight or ten minutes.
Q. What was she doing in the work-room?
A. I did not see her working at all.
Q. You sent for her and she came in to see you?
A. Yes, sir.
Q. Did she show you any goods?
A. No, sir.
Q. What was her occasion for skipping around the room?
A. She followed my friend as she walked around.
Q. Isn't it a fact that your friend was feigning to buy hats and that this was a wholesale house?
A. That was not it wholly; said she might buy several hats.
Q. You told Miss Power that you had been recommended to her?
A. I think she asked my friend why she had been called from the work-room.
Q. Did you hear the conversation?
A. Yes, sir.
Q. Had you posted your friend as to what she *she* should say before you got there?

Objection sustained.

Q. Mrs. Bowerman, who paid your expenses and return?
A. Mr. Smith.
Q. Willard Smith?
A. Willard Smith.
Q. Where did he get money from?
A. He said he was authorized by Mr. Holmes.
Q. You went at the request of Mr. Jones?
153 A. Yes, sir.
Q. Did he tell you where your compensation was to come from?
A. No, sir.
Q. Gave you your expenses to Chicago?
A. I live in Chicago.
Q. And was you living in Chicago at the time?
A. I was.
Q. And did you get a letter from Dr. Jones relative to this matter?
A. Yes, sir.
Q. What did he tell you to do?

Objection. Sustained.

Excused.

Miss POWER recalled:

By HALL:

Q. Miss Power, did you ever see this man, Mr. Sha*pr*?
A. Yes, sir; I did.
Q. Where?
A. In Chicago.

Q. At what place?
A. At my sister's house, 170 Laflin street.
Q. Do you know what he told your sister?

Objection. Sustained.

Q. I will show you this card. Did you ever see that before?
A. Yes, sir; that is the card he handed my sister when he asked for board.

Plaintiff offers in evidence the card, marked "Ex. B."

Q. Do you know what this fellow told your sister his business was—why he wanted to board there?
A. I do not. I supposed he came there in an honorable way to board and room.
154 Q. How long had he been there before your suspicions were aroused?

Objection. Sustained.

Q. Do you remember the morning Mr. Sharp followed you in Chicago?
A. I do.
Q. You heard his testimony as to how you got into the car?
A. Yes, sir.
Q. Was his testimony correct?

Objection. Sustained.

Q. How did you get out of the car that morning?
A. I got on as I usually did; cane in my left arm; caught the bar of the carette or car and stepped with my right foot up and then my left on my heel and got in in that way, the way I always did.
Q. Do you remember of Mrs. Bowerman being at D. B. Fisk's while you were engaged there?
A. I never saw the lady. There was a lady called. She called herself Smith.
Q. Was this lady with her?
Q. She was not in my part of the room—not near enough to hear the conversation.
Q. Do you know whether she could see?
A. If she was in the room she could see me.
Q. Did you see her?
A. Not to my knowledge.
Q. Where was you when this lady called?
A. In the work-room.
Q. Sitting down there?
A. Yes, sir.
Q. Why did you go there?
A. There was a call that Miss Power was wanted. I went in. A strange lady stepped up and asked if I was Miss Power.
Q. What did you say?

155 A. I said I was, and she said she wanted to purchase some hats for her sister who was coming North to be married. In the first place she asked me if I was the head lady there. I told her Miss Butler. She said, it is you I want to see. She spoke of buying hats, and I told her this is a wholesale house, and that would come under the head of retail; that she had better see Miss Butler.

Q. How long was this lady there?

A. Five or ten minutes.

Q. And this lady, Miss Butler, did not see her?

A. I do not think she saw her.

Q. You heard Mr. Sharp telling about you running through the hall of your sister's house?

A. Yes, sir.

Q. State whether you did run.

A. I never ran; I have never been able to run; I may have walked a little faster; I don't think Mr. Sharp ever saw me if I did.

Excused.

PLAINTIFF'S EXHIBIT "A" & "B."

STATE OF NEBRASKA, } ss:
Lancaster County, }

LINCOLN, NEBRASKA, *June 24th*, 1889.

The city of Lincoln debtor to Miss Maggie J. Power in the sum of $5,000.00 for personal injuries sustained by reason of the defective and dangerous condition of the sidewalk in said city on or about the 31st day of May, 1889.

Said accident, by which this affiant was damaged in the above sum of money, occurred on the west side of 12th street, between O & P streets.

The nature of the injury sustained is a wrench, sprain, and injury to this affiant's ankle and foot, which occurred by reason of this affiant's stepping through a hole in the sidewalk, which

156 said sidewalk was in an imperfect and dangerous condition.

No part of the above claim, which is reasonable and just, has been paid to this affiant by the said city of Lincoln.

MAGGIE J. POWER.

Subscribed in my presence and sworn to before me this 24th day of June, A. D. 1889.

[SEAL.] A. G. GREENLEE,
Notary Public.

Endorsed: Claim of Maggie J. Power for personal injury. Marquett, Deweese & Hall, att'ys for claimant.

The city of Lincoln to Maggie J. Power, Dr.

1889.		Dollars.	Cts.
June 24.	To personal injury as per statement attached	5,000	

THE STATE OF NEBRASKA, } ss:
County of Lancaster, }

The undersigned, being first duly sworn, on oath says that the above account is just, correct, and reasonable; that the labor was rendered and material furnished as charged for therein, and that the same has not been paid.

(Signed) MARQUETT, DEWEESE & HALL,
Att'ys for Claimant.

Subscribed in my presence and sworn to before me this June 24, 1889.

D. C. VAN DUYN, *City Clerk.*

Upon the back of said exhibits appear endorsements in words and figures following, to wit: No. —. Fund. Claim of Maggie Power. Filed Jun- 24th, 1889. D. C. Van Duyn, city clerk. Amount claimed, $5,000; amount allowed, $—. Pub. June 25, '89.

(Here follows diagram marked p. 157.)

158 Ex. B.

S. E. Cross. Frank Sharpe.

Real estate and loans; builders and seller- of houses; subdivider- and owner- of city and suburban property; S. E. cor. Dearborn and Randolph Sts. Lots, houses, and stores in the north, south and west divisions of the city for sale on small cash payments; balance *cast* monthly payments; 30,000 lots sold, 7,000 houses built and sold, 16 thriving towns located by *me* in the past ten years.

The defendant claimed that it was error and took exceptions to the ruling of the court in permitting the claim against the city of Lincoln, filed by said plaintiff with the city council; also the question put to the witness Gosper: Did you insist on her going to work? Objected to as incompetent; overruled, and the defendant excepted. Also question to the plaintiff, put to her by the defendant: You knew this property had the same privileges you had? Objected to by plaintiff as improper, and sustained. Who arranged the show-case windows or outside space in front of Mrs. Gosper's store? Objected to by plaintiff as improper; sustained. Also question put to the witness Relander. Also the defendant claimed error and duly objected and excepted thereto in permitting the witness T. A. Herdsman to testify, to wit: You may state whether or not you had your attention called to this defective or dangerous place during that interval. Objected to as leading, suggestive, and incompetent; overruled. Excepted to by the defendant. And in refusing to permit the defendant in its cross-examination of this witness to answer the question: Had you any rights upon those premises by right

of your occupancy of the other store-room? Also in
159 admitting page 7 of *of* Municipal Code of 1889; also page 24, section 34, of said code; also section 1109, page 314 of said code, as well as section 1090, pages 308 & 309 of said code.

The defendant claimed court erred in refusing to permit the witness W. D. Cox to answer the question: How large were the pieces of ice? and objected and excepted thereto.

Defendant further claims error and excepted and objected that the court refused to give the written instructions asked by the defendant in writing as follows:

No. 2½. The jury are instructed that under all the evidence and the law in this action the defendant is entitled to your verdict; you will therefore bring in a verdict for the defendant.

Refused. Def't excepts.

No. 7. The jury are instructed that 48 inches or two feet from the lot line of said building extending out over the street, immediately in front thereof, is an area space and was such at the time the accident is said to *g*ave occurred in this action, and it was the duty of the defendant in traveling along said sidewalk, if she saw fit to walk inside of the area space, to exercise greater care, caution, and prudence than while walking upon the sidewalk space of said street; and if the jury find from the evidence that the owner of said premises, Doctor Jones, had protected and covered said opening through the sidewalk immediately adjacent to his building to admit light and air to the basement of his said building by strong iron grates or bars which were not more than one inch apart and so constructed that the same could be walked upon with safety and of sufficient strength to hold any reasonable weight that might come upon it at that point, and that some third person, wrongfully and without right or authority from the said Doctor Jones or the said city of Lincoln, removed said iron grate or took and carried it away, and that the city had no knowledge thereof, then you will find for the defendant.

160 Refused. Excepted to by def't.

Inconsist*a*nt in itself in first part, not matter of law but fact stated.

9. The court instructs the jury that the plaintiff while walking along the sidewalk at the time she was injured, she was bound to exercise good ordinary case and prudence to avoid any injury and not fall or slip into said light or area way. If the companions who were walking with her pushed or crowded her within the area space in front of said building and into said light or area space in front of said building and into said light or area way, then the defendant would not be liable for the injuries received, and if the jury find from the evidence that the plaintiff was pushed or crowded into said light-hole by her companions while walking along said sidewalk, then you will find for the defendant.

(Refused. E. S. D. Def't excepts.)

No evidence to show that plaintiff was pushed or crowded into the hole.

12. The court instructs the jury that when an act is done which

is unlawful in itself, such as leaving open a dangerous hole in the sidewalk in a public street of a city over which there is a large amount of travel which detracts from the safety of traveling, the author will be liable for an injury resulting from the act although other causes subsequently arising may contribute to the injury.

(Refused. Defendant excepts.) Not appropriate or applicable in this case.

6. The defendant claimed that the court erred in giving the instructions to the jury orally upon its own motion as follows, and excepted to by the defendant, and especially the introductory part of said oral instruction and that part relating to Doctor Jones and reference to his collusion with the city of Lincoln as well as that portion of said oral charge in relation to said notice being served by plaintiff upon defendants, and especially that part of said
161 oral instruction relating to the notice to the city *in* the condition of said sidewalk prior to said injury as well as to that part relating to the area part of the sidewalk; also to that part of said oral instruction relating to the duty of the officers or any of them to the said city or any other city, as well as to the injuries to the plaintiff, whether she was negligent or not or contributed to her supposed injuries or permanent injuries, length of her life, the amount of damage she should recover, reference to the Carlilse table, to wit:

GENTLEMEN OF THE JURY: In this case we have a bright, pretty little lady from Iowa arrayed against 55,000 good, wise, prosperous, and virtuous people who occupy and own this city. It would seem on first view that the contest was decidedly unequal, as it perhaps was between the little David and the great Goliath.

If, however, the plaintiff comes armed with the sling and sword of truth to fight her battle, then the might and power of the world ought not to prevail against her.

It is for you to say whether she is thus armed, and it is your right to know and your duty to say whether she has the truth on her side or not. If law, reason, justice, and truth be on her side, then it is the duty of this jury to state that fact and give to her such damages as the evidence warrants.

Pretty much all I propose to say is in writing; and what I shall have to give outside of the instructions asked for by the parties is for the purpose of laying before you the law so that you can give it a fair and proper consideration.

In this connection I wish specially to say that, before this trial commenced, Dr. Jones, who is represented here by counsel (who, however, is not a party to this suit), who is said to be the owner of the property in front of which this accident occurred, and those who represent him, came here and asked to be made a party defendant, because and for the reason as claimed that if the city should be compelled to pay the damages arising from the defective sidewalk that therefore the city would have an action against Dr. Jones for
162 the damages the city might have to pay. Without careful consideration I thought he ought to be allowed to become a

party defendant so as to prevent the possibility of collusion with the plaintiff. I gave him leave to file an answer and become a party, but he did not see proper to do so. I said further that if Dr. Jones was interested I would hear him in person or by his counsel and he is represented in the trial. He did not see fit to file his answer, but is here with his attorneys. So you will see the reason why Dr. Jones has his att'ys taking part in this trial. Now, as I think and as I should hold under the proof, Dr. Jones could not in any manner be held liable for this injury to the plaintiff. So far as Dr. Jones is concerned, as to whether he is liable to the city for any neglect, we must leave that out of the question here.

In that connection I desire to call your attention to a paper that has been introduced in evidence and which purports to be a notice served on the city authorities as the law requires; and I take it the notice, which is presented in evidence and on which the plaintiff to some extent relies, and which is the basis of this action, that there is not only a substantial but a litteral compliance with the law. It states all that the law requires before an action is commenced in a court of justice in this State. The only thing that surprises me about it is that it is so technically correct. So far as that question is concerned, it is absolutely at rest. It is good for all purposes connected with this suit.

Upon this city is imposed the duty of the opening and repairing streets and keeping them in a safe and proper condition so that every prudent person may pass over them with reasonable safety. The same duty is imposed upon the authorities in all cities, and especially in the great cities like this, where the streets are so long and so much travelled, and especially where this accident occurred, where numerous people are said to be passing constantly during the day and night, the duty is to exercise gr-ater care than
163 *than* where streets are away from the principal places of business of the city. The law authorizes the city authorities to do certain things, and expects and absolutely requires them to be done. If a person is injured in consequence of a failure to do so, the injured party being free from blame, then the law requires them to perform the only remedy, which is to respond in damages—that is, the one sought by this plaintiff. You must take into consideration all the testimony, the knowledge you have gained upon going to the ground and place where the accident occurred and whether the city had knowledge of the fact that the danger existed; and, if it had existed, how long and for what length of time. The law has vested in certain officers not only the authority but the duty to look after these several streets. There is a street commissioner or a sidewalk inspecter who was called here to testify; the testimony tends to show that it is made his duty to look after these streets; that he has a deputy, and that it is his duty to look after the condition of the streets. The mayor might be required to do the same thing; he is the commanding officer and can require his subordinates to move. The ordinance has been read in your hearing, where it is shown to be the duty of the police officers to look after the streets, and when the fact is discovered that there is a dangerous place it

is their duty to report to the proper authorities. It is their duty to look after these things for the safety of the people. The testimony, so far as relates to this matter, tends to show that there was one policeman who was there who saw the dangerous place—saw this hole—and that it was on his beat. His attention was specifically called to it. He saw it and repaired or replaced the grating or claimed to have done so. Now, that is knowledge, actual knowledge brought to the proper authorities of the city, whose duty it is to look after such matters.

Now, if this be so, then so far as this question is concerned the city had actual notice of the condition of the hole, and there
164 is no question of constructive notice about it. The police officer had knowledge of the hole. The law requires the police officer to look after such matters and report the condition. It becomes his duty to see that a dangerous place is made passably safe.

Well, now, was that done? There was actual knowledge to the city, if the actual knowledge was brought home to the proper officer.

What is an officer's duty under the circumstances? Can the officer wait? Can he put off from day to day, from time to time, and not repair the dangerous place and make it safe? He cannot do that. It is his duty to make it safe when he knows that it is unsafe and the place is dangerous. It is his duty to guard against the danger. It is his duty to make it safe, so that the children and others whom we are bound to protect may not be injured through carelessness and negligence of the city officers.

Did he do that? The testimony is diverse as to the time the danger existed. But did it exist long before the officer had knowledge of it, or did it exist after the officer had knowledge and until the accident occurred? *How*, if you are satisfied on that part of the testimony, and you find that the plaintiff was not negligent in walking on that part of the walk and the defendant knew of the defect and permitted it to remain so that the plaintiff was injured, you will find for the plaintiff and that the city was guilty of negligence.

I had an opportunity to view the place where the accident occurred, the same as you have. It occurs to me where a sidewalk is twenty feet wide or more or less it is just as proper to use one part as the other. Where a city prescribes a sidewalk and requires it to be built according to regulations certainly everybody has a right to use the whole walk. Was the plaintiff guilty of any contributory negligence that resulted in her injury; whether it was prudent for her to be there; whether she had any right to be up
165 by the side of the building or not? Where it is all open it seems to me that the public has a right to use the whole of the sidewalk as well as any part.

Did she exercise proper care and judgment in passing along there? Did she use ordinary care and prudence in passing there; and, if she has, could she have guarded against this injury that she received? An ordinary person, in the nature of things, walking

through a street cannot look where every step is taken—cannot look at everything around and about them. They look at windows, stores, or persons, or anything of that sort that attract the attention of the observing person. What does an ordinary person do under such circumstances? Consider and apply your own good judgment, good sense, and common understanding, and say what ordinary persons — under similar circumstances.

Now, if you find that the plaintiff has not contributed to the injury, and you further find that the defendant was guilty of negligence in permitting this hole to remain in the sidewalk, what are you then going to do? These are two questions to which you must direct your inquiry; and if you find that the plaintiff is not to blame and that the city neglected to do what it ought to have done, then there is one other question of the first importance. I mean the amount of damage the plaintiff ought to receive in consequence of the injury sustained. How are you going to consider and settle that? As I have said, among other written instructions, take into consideration all the facts and circumstances, and see whether it is likely to last the plaintiff her lifetime or how long; whether permanent in its nature or how serious, and take into account all the facts, how much she suffered and how much she is injured, and how far she is disabled from earning as much money as before the accident and how much she will necessarily suffer from the fall and the loss of the use of the limb. Does she have to suffer all her
166 life from that injury? And whether it will disable her from earning as much as she did before the injury. There is some difference in the testimony. Take and compare the testimony and see the difference in that regard.

How with reference to the amount of money the party is entitled to recover from the injury, if entitled to recover at all, resulting from the accident upon the sidewalk. The balance has not yet been made fine enough to weigh a single minute of pain. No correct idea can be formed by a person who has never suffered from a sprain, so that you cannot form any correct idea of how much pain this plaintiff has suffered by reason of the sprain. I might, if I saw proper, speak from experience, but it is not necessary. The doctors have fully testified about the receiving of such an injury as this sprain. Some of them have told you such a sprain is sometimes worse than a broken bone. Gentlemen, the testimony upon that point is nearly universal—that a broken bone may recover, and that it is possible that that sprain may never get well.

Now, there is no rule to ascertain the money value of the pain she must undergo. How long she has suffered, how intense she has suffered in the past and how much she is likely to suffer in the future is proper for you to consider. The Carlisle tables, new to some of you, no doubt, are to be considered here. They are what we ordinarily use in lawsuits in cases like this. They show the probable duration of life. It may seem remarkable that a middle-aged person should recover more damage than an older person, and a younger person more than a middle-aged person. It looks a little rough on the old fellow, but nevertheless this is the rule. The

reason for this is where a person has got to live a long while and suffer from day to day, and where the pain is the result of the injury received, that person should receive more than the one who must suffer but a short time. It is the rule to apply in this case. This individual, according to her statement, is 43 years old. Carlisle, in his tables, shows that where a person lives to be 43 years old he is likely to live 25 years and a fraction longer, almost 26 years. That result is arrived at after making extended comparisons, inquiries as to the ages, inquiries as to the birth and death of numerous persons, and from which comparisons and investigations they have made up this table. The plaintiff's "expectancy," according to this table, is almost 26 years. Suppose she will live 25 years longer. If you find for her at all you ought to find that, if she is to suffer from this accident 25 years, she ought to have more damages than if she is to suffer one year. Take into consideration & apply the rule here stated, so as to be able to arrive at a proper & sensible conclusion in the premises.

167 9. The defendant claimed that the court erred in giving the instructions to the said jury in writing offered by the said plaintiff and numbered as follows, which were duly excepted to, to wit:

1. The jury are instructed that the streets and sidewalks in the city of Lincoln, including the place where the accident is alleged to have happened, were under the absolute control of the city of Lincoln, through its officers and agents, and that it was the duty of said city to keep the sidewalk in question in a safe and suitable condition for people traveling on foot, and for this purpose it was the duty of said city and its officers to keep the said sidewalk free from obstructions and not allow any hole or break in the sidewalk by which a person might be hurt to be left uncovered or open so that an accident might happen; and if the city and its officers did not observe this rule of law, and that by reason of such failure the plaintiff was injured without fault on her part, then the city is liable in damages for the injury thus sustained. (Given. E. S. D. Defendant excepts.)

2. If the jury find in this case that the hole or excavation in the sidewalk where the plaintiff claims to have been injured was by any one or for any reason left open so that the same was dangerous to people passing along the sidewalk, and you further find that one or more of the police officers of said city was notified of the condition and danger of this place before this accident happened, then you are instructed that it was the duty of the city to immediately place such a protection over or around said hole as would make it safe and do away with the danger to people in walking along said sidewalk, and if the city through its officers neglected to repair the defect or cover or protect this hole after it knew of its unsafe condition, and the injury resulted to this plaintiff, as heretofore stated, then she is entitled to recover from the city the full amount of damage which in your judgment she has sustained or will sustain on account

168 of said injury. (Given. Defendant excepts.)

4. You are instructed that you have nothing to do with and need not consider the person who was the owner of the property in

front of whose premises this excavation was allowed to be exposed. The question for you to consider is simply whether the city neglected its duty in making and maintaining a safe suitable sidewalk for persons walking along the same, and sufficiently protecting all holes or traps through which a person might accidentally or innocently fall; and if it did not do its duty in this respect, it is liable regardless of the ownership of the property in front of which the defect existed. (Given. Defendant excepts.)

5. The jury are instructed that if you find for the plaintiff in this case, then you will allow her such damages as will fully compensate her for all the pain, suffering, distress, inconvenience, loss of time, and the power to earn money which has resulted or may result to her on account of said injury. In other words, the city is bound to answer to the plaintiff in such damages as will wipe out the existence of the results of said injury, so far as it is possible, by means of damages in money, and in determining this you will take into consideration and find from the evidence that has been introduced the amount of suffering, pain, distress, inconvenience, and loss of power to labor and earn money that has resulted to the plaintiff or that may result in the future on account of said injury, taking into consideration, as detailed in the evidence, the probability of the effect of this injury in the future, as well as in the past, and allow to her such damages as in your candid judgment you think that she has sustained or will sustain in the future. (Given. Defendant excepts.)

169 In the Circuit Court of the United States, District of Nebraska.

MARGARET J. POWER, Plaintiff,
vs.
CITY OF LINCOLN, Defendant.

Defendant's Bill of Exceptions.

And the defendant in the above-entitled cause in the circuit court of the United States, district of Nebraska, having within the proper time reduced to writing in this the defendant's bill of exception- all of the testimony adduced or offered on both sides on the hearing of the before-named cause in the before-named court; all of the objections, with the grounds therefor, made to the admission of the testimony; all of the rulings of the court on such objections, and all of the exceptions to such rulings made and taken at the time, and having served the same on the attorneys for the before-named plaintiff, according to law, for examination and amendment, and the same being now here before me, the undersigned judge, before whom the said cause was heard, on the motion of the attorneys for the defendant that the same may be settled, allowed, signed, sealed, and made a part of the record in the said cause in the said court—

Now, I, the said judge, do hereby certify that this the defendant's bill of exceptions contain all of the testimony adduced by the plaintiff and the defendant on the hearing of said cause, all of the

rulings of the court on such objections, and all of the exceptions to such rulings made and taken at the time.

Wherefore I, the said judge, do hereby settle, allow, and sign this the defendant's bill of exceptions, and do hereby order that it be made a part of the record in said cause in said court.

This bill of exceptions was presented to me for signature about the 2d day of March last. Absence from the State prevented examination of it before the time last named.

Done at Omaha, Neb., Ap'l 13, 1891.

ELMER S. DUNDY, *Judge.*

170 Upon the back of said bill of exceptions appear endorsements in words and figures following, to wit: No. 139 O. Margaret J. Power *vs.* The City of Lincoln. Bill of exceptions. Presented for examination and signature of the court on March 2, 1891, and filed April 13, 1891. E. D. Frank, clerk.

LINCOLN, NEBRASKA, *February 24th*, 1891.

Received of L. C. Burr, att'y for said city, the within proposed bill for suggestion.

MARQUETT, DEWEESE & HALL,
Attorneys for Plaintiff.

MARCH 2, '91.

Returned to L. C. Burr.

MARQUETT, DEWEESE & HALL,
Att'ys for Pl'ff.

Thereupon, afterwards, to wit, onthe 8th day of May, 1891, a writ of error was allowed in said case and a citation issued thereon, of which said writ of error and citation the following are the originals thereof:

171 UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Margaret J. Power, plaintiff, and The City of Lincoln, in Lancaster county, Nebraska, defendant, a manifest error hath happened, to the great damage of the said plaintiff in the said cause, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that, you have the same at Washington within

thirty days from this eighth day of May, 1891, next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Seal United States Circuit Court, District of Nebraska.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this eighth day of May, 1891.

E. D. FRANK, *Clerk.*

Allowed by—
ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 139 O. United States circuit court, district of Nebraska. Margaret J. Power *vs.* The City of Lincoln. Writ of error. Filed May 8, 1891. E. D. Frank, clerk.

172 THE UNITED STATES OF AMERICA, *District of Nebraska,* } ss:

To Margaret J. Power, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from May eighth, 1891, next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein The City of Lincoln is plaintiff in error *plaintiff in error* and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable, Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Omaha, this eighth day of May, 1891.

[Seal United States Circuit Court, District of Nebraska.]

ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 139 O. United States circuit court, district of Nebraska. Margaret J. Power *vs.* The City of Lincoln. Citation. Filed May 8, 1891. E. D. Frank, clerk. Filed May 18, 1891. Elmer D. Frank, clerk.

DISTRICT OF NEBRASKA, ss:

I hereby certify and return that on the 15th day of May, 1891, I received this citation, and on the 16th day of May, 1891, I served the same upon the within-named Margaret J. Power, defendant in error, in Lincoln, Lancaster county, State and district of Nebraska, by delivering to and leaving with Marquett, Deweese and

Hall, her att'ys, a certified copy thereof, with all the endorsements thereon.

BRAD. D. SLAUGHTER,
United States Marshal for the District of Nebraska,
By A. G. HASTINGS,
Deputy United States Marshal.

Service	2 00
Copy	30
Mileage	3 30
Marshal's costs	$5 60

Paid by pl'ff, City of Lincoln.

[Endorsed:] Filed May 18, 1891. Elmer D. Frank, clerk.

173 UNITED STATES OF AMERICA, *District of Nebraska,* } *ss:*

By virtue of the foregoing writ of error and in obedience thereto I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios, from one to 173, contain true and faithful transcripts of the pleadings and proceedings of record and on file in my office as said clerk in the case of Margaret J. Power, plaintiff, *vs.* The City of Lincoln, Nebraska, defendant, and that copies of the writ of error and citation have been lodged and remain in my said office.

Witness my hand and the seal of said court, at Omaha, this 18th day of May, A. D. 1891.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

174 In the Supreme Court of the United States.

THE CITY OF LINCOLN, Plaintiff in Error,
v.
MARGARET J. POWER, Defendant in Error. } Assignments of Error.

Comes now the said plaintiff in error and makes the following assignment of errors in this case, to wit: The damages in this case are excessive, appearing to have been given under the influence of passion and prejudice, and for too great a sum for the injuries said to have been sustained by the defendant in error and caused by the plaintiff in error.

The verdict and the judgment is not sustained by sufficient evidence, and under the evidence given herein said verdict and judgment should have been for the defendant.

The court erred in excluding the evidence offered on the part of said city and in permitting said claim filed by said plaintiff with said city council to be admitted in evidence against the objections and exceptions of said city.

The court erred in admitting the evidence of Mrs. Gosper to the question, "Did you insist or her going to work?"

The court erred in excluding the evidence of Dr. Jones, offered by said city, while upon the witness stand.

The court erred in excluding that part of the testimony of the witness W. D. Cox excepted to by said city.

The court erred in excluding the questions put to the plaintiff while she was upon the witness stand, "You know this property had the same privileges that you had;" and also the question, "Who arranged the show-cases, windows, and outside space in front of Mrs. Gosper's store?"

The court erred in refusing to permit the witness Rehlander to state whether or not she told you how this accident happened.

The court erred in refusing to give the instructions asked by the defendant and numbered as follows, to wit:

175 2½. The jury are instructed that under all the evidence and the law in this action the defendant is entitled to your verdict. You will therefore bring in a verdict for the defendant.

7. The jury are instructed that 48 inches or two feet from the lot line of said building extended out over the street immediately in front thereof is an area space and was such at the time the accident is said to have occurred in this action, and it was the duty of the *defendant* in travelling along said sidewalk, if she saw fit to walk inside of the area space, to exercise greater care, caution, and prudence than walking upon the sidewalk space of said street, and if the jury find from the evidence that the owner of said premises, Doctor Jones, had protected and covered said opening through the sidewalk immediately adjacent to his building to admit light and air to the basement of his said building by strong iron grates or bars which were not more than one inch apart and so constructed that the same could be walked upon with safety and of sufficient strength to hold any reasonable weight that might come upon it at that point, and that some third person wrongfully and without right or authority from the said Doctor Jones or the said city of Lincoln removed said iron grate or took and carried it away, and that the city had no knowledge thereof, then you will find for the defendant.

9. The court instructs the jury that the plaintiff while walking along the sidewalk at the time she was injured she was bound to exercise good ordinary care and prudence to avoid any injury and not fall or slip into said light or area way. If the companions who were walking with her pushed or crowded her within the area space of said building and into said light or area way, then the defendant would not be liable for the injuries received, and if the jury find from the evidence that the plaintiff was pushed or crowded into said light-hole by her companions while walking along said sidewalk, then you will find for the defendant.

12. The court instructs the jury that when an act is done which is unlawful in itself, such as leaving open a dangerous hole in the sidewalk in a public street of a city over which there is

176 a large amount of travel which detracts from the safety of travellers, the author will be liable for an injury resulting

from the act, although other causes subsequently arising may contribute to the injury.

The court erred in giving the instructions to the jury orally upon its own motion as follows:

GENTLEMEN OF THE JURY: In this case we have a bright, pretty little lady from Iowa arrayed against 55,000 good, wise, prosperous, and virtues people who occupy and own this city. It would seem on first view that the contest was decidedly unequal, as it perhaps was between little David and the great Goliath. If the plaintiff comes armed with the sling and sword of truth to fight her battle the might and power of the world could not prevail against her. It is for you to say whether she is thus armed, and it is your right to say whether she is truthful in this or not. If law and reason and justice be on her side, then it is the duty of this jury to state that fact and give to her such damages as evidence warrants.

Pretty much all I propose to say is in writing; and what I shall have to give outside of the instructions asked for by the parties is for the purpose of laying before you the law so that you can give it a fair and proper consideration.

In this connection I wish specially to say that before this trial commenced Dr. Jones, who is said to be the owner of the property in front of which this accident occurred, or those who represent him came here and asked to be made a party defendant because and for the reason that if the city should be compelled to pay the damages arising from the defective sidewalk that therefore the city would have an action against Dr. Jones for the damage the city would have to pay. Without careful consideration I thought he ought to be allowed to become a party defendant, so that the city should not go in collusion with the plaintiff. I gave him leave to file an answer and become a party, but he did not see proper to do so; and I said further that if Dr. Jones was interested I would hear his counsel. He did not see fit to file his answer, but is here with his attorneys. Now, as I think, and as I should hold, I believe Dr. Jones could not in any manner be held liable for this injury to the plaintiff. So far as Dr. Jones is concerned, as to whether he is liable to the city for any neglect, I should leave that out of the question.

177 In that connection I desire to call your attention to a paper that has been introduced in evidence and which purports to be a notice served on the city authorities as the law requires; and I take the notice, which is presented, and on which the plaintiff relies and which is the basis of this action, that there is not only a substantial but a literal compliance, and states all that the law requires before an action is commenced in any court of justice in this State. The only thing that surprises me about it is that it is so technically correct. So far as that question is concerned it is absolutely at rest. It is good for all purposes.

Upon this city is imposed the duty of opening and repairing streets and keeping them in safe and proper condition so that everybody may pass over them with reasonable safety. The same duty is imposed upon the authorities in all cities, and especially in the

great cities like this, where the streets are as long, and especially where this accident occurred, where numerous people are passing constantly during the day and night, the duty is to exercise greater care than where the streets are away from the principal places of business of the city.

The law authorizes the city authorities to do certain things and expects and absolutely requires them to do so, and if a person is injured in consequence of a failure to do so the law requires them to perform the only remedy, which is one of damages, and is the one asked for by this plaintiff. You must take into consideration the testimony, the knowledge you have gained upon going to the ground, the place where the accident occurred, and whether the city had knowlege of the fact that the danger existed and if it had existed any length of time. The law has vested in certain officers, not only the authority, but the duty to look after these several streets. There is a street commissioner or a sidewalk inspector, who was called here to testify, and it is made his duty to look after these streets, and he has a deputy, and it is his duty to look after the condition of the streets. The mayor might be required to do the same thing, but he is the commanding officer, but can require his subordinates to move; require them to do anything. The ordinance has been read where it is the duty of the police officer to look after the streets, and when the fact is discovered that there is a
178 dangerous place it is his duty to report to the proper authorities. It is his duty to look after these things for the safety of the people. The testimony so far as relates to this shows that there was one policeman, who was there, who saw the dangerous place; saw this hole. His attention was specifically called to it. He saw it and repaired or replaced the grating. Now, there is knowledge, actual knowledge, brought to the proper authorities of the city, whose duty it is to look after it.

Now, so far as this question is concerned, the city had actual notice, no constructive notice, about it. The police officer has knowledge of the hole. The law requires the police officer to look after such matters and report the condition. It becomes his duty to see that the dangerous places *is* made safe. Well, now, was that done? There was actual knowledge to the city, because the actual knowledge was brought home to the proper officer. What is an officer's duty under the circumstances? Can that officer wait? Can he put off from day to day, from time to time, and not repair the dangerous place and make it safe? He cannot do that.

It is his duty to make it safe when he knows that it is unsafe and that the place is dangerous. It is his duty to guard against the danger. It is his duty to make it safe, so that the children, whom we are bound to protect, may not be injured. Did he do that?

I amit the testimony is diverse as to the time *the time* the damage existed. But did it exist long before the officer had knowledge or did it exist after the officer had knowledge and until the accident occurred? Now, if you are satisfied on that part of the testimony, and you find that the plaintiff was not negligent in walking on that part of the walk, and the defendant knew of the defect and permitted

it to remain, so that the plaintiff was injured, you will find for the plaintiff and that the city was guilty of negligence. I had an opportunity to view the place. It occurs to me that where a sidewalk is twenty foot wide it is just as proper to use one part as well as the center; where a city describes a sidewalk, certainly everybody has a right to use the whole walk.

Was the plaintiff guilty of any contributary negligence that resulted in the injury to the plaintiff? Whether it was prudent for her to be there, whether she had any right to be up by the side of the building or not where it is all open, it seems to me that the public has the right to use the whole of the sidewalk as well
179 as any part. Did she exercise proper care and judgment in passing along there? Did she exercise proper care and prudence in passing there; and, if she had, could she have guarded against this injury that she received? An ordinary person, in the nature of things, walks through a street and cannot look every step they take—cannot look at every thing; they look at the windows of the stores, the music stores, or anything of that sort to attract the attention of the observing person. What does an ordinary person do under the circumstances? Consider; apply your own good judgment—good sense. What do persons do under similar circumstances?

Now, if you find that the plaintiff has not contributed to the injury, and you further find that the defendant was guilty of negligence in permitting this hole to remain in the sidewalk, what are you going to do? These are the two questions to direct your inquiry; and, if you find the plaintiff is not to blame and the city neglected what it ought to have done, then there is one question—the amount of damage the plaintiff ought to receive upon the question of the injury sustained. How are you going to do that? As I have said among these written instructions, take into consideration all the facts and circumstances and see whether it is likely to last her lifetime or how long; whether it is permanent in its nature or how serious, and take into account all the facts; how much she has suffered and how much she is injured, and how far she is disabled from earning as much money as before the accident, and how much she will necessarily suffer from the fall and the loss of limb, does she have to suffer all her life from that injury, and whether it will disable her from earning as much as she did before the injury. There is some difference in the testimony. Take and compare the testimony and see the difference in that regard.

Now, with reference to the amount of money the party is entitled to recover from the injury resulting from the accident upon the sidewalk. The balance has not been made fine enough to weigh a single minute of pain. They cannot tell anything about it. No correct idea can be formed by a person who has never suffered from a sprain, so that you cannot form any correct idea of how much pain this plaintiff has suffered by reason of the sprain. I might, if I saw proper, speak from experience; it is not necessary. The doc-
180 tors have fully testified about the receiving such an injury as this sprain. They have told you such a sprain was worse

than a broken bone. Gentlemen, the testimony on that point is universal—that a broken bone may recover and that it is possible that a sprain may never get well.

Now, there is no rule to ascertain the money value of the pain she must undergo; how long she has suffered; how intensely she has suffered in the past, and how much she is likely to suffer in the future is proper for you to consider. The Carlisle tables, new to some of you, no doubt, but some of you have heard of them, they are what we ordinarily use in lawsuits. They show the probable duration of life. It may seem remarkable that a middle-aged person should recover more damage than an older person, and a younger person than a middle-aged person. It looks a little rough on the old fellow.

It is the rule; the reason for that—the reason is, where a person has got to live a long while and suffer from day to day, where the pain is the result of the injury received, that person should receive more than the one who must suffer but a year. It is the rule to apply in this case. This individual according to her statement is 43. Carlisle, in his tables, shows that where a person lives to be 43 they are like to live 25 and a fraction longer, almost 26 years. The result is arrived at after making extended comparisons, inquiries as to the ages, inquiries as to the birth and death of numerous persons, and from which comparisons and investigations they have made up this table. Her average life, according to this table, is almost 26 years. Suppose this plaintiff will live 25 years longer; if you find for her at all you ought to find that she is to suffer from this accident 25 years, and ought to have more damages that if she is to suffer one year. Take into consideration this rule so as to be able to give a requisite and sensable conclusion in the premises.

The court erred in permitting the witness J. A. Herdman to testify to the question as follows: You may state whether or not you had your attention called to the defective or dangerous place during that interval.

The court erred in refusing to permit the witness —— ——, in his cross-examination, to answer the question, Had you any right on those premises by right of your occupancy of the other storeroom?

181 The court erred in admitting page 7 of the Mun-cipal Code of the city of Lincoln for the year 1889, and page 24, section 34 of said code, and also sections 1107 of said code; and also sections 1109 as well as sections 1090 of said code.

The court erred in refusing to permit the witness W. D. Cox to answer the question put to him by said city: "How large were those pieces of ice?"

The court erred in giving instructions to the jury in writing offered by said plaintiff and numbered as follows:

1. The jury are instructed that the streets and sidewalks in the city of Lincoln, including the place where the accident is alleged to have happened, where under the absolute control of the city of Lincoln through its officers and agents, and that it was the duty of said city to keep the sidewalks in question in a safe and suitable condi-

tion for people traveling on foot, and for this purpose it was the duty of said city and its officers to keep the said sidewalk free from obstructions and not allow any hole or break in the sidewalk by which a person might be hurt to be left uncovered or open so that an accident might happen; and if the city and its officers did not observe this rule of law and that by reason of such failure the plaintiff was injured without fault on her part, then the city is liable in damages for the injury thus sustained.

2. If the jury find in this case that the hole or excavation in the sidewalk where the plaintiff claims to have been injured was by any one or for any reason left open so that the same was dangerous to people passing along the sidewalk, and you further find that one or more of the police officers of said city was notified of the condition and danger of this place before this accident happened, then you are instructed that it was the duty of the city to immediately place such a protection over or around said hole as would make it safe and do away with the danger to people in walking along said sidewalk, and if the city through its officers neglected to repair the defect or cover or protect this hole after it knew of its unsafe condition and the injury resulted to this plaintiff as heretofore stated, then she is entitled to recover from the city the full amount of damages which in your judgment she has sustained or will sustain on account of said injury.

182 4. You are instructed that you have nothing to do with and need not consider the person who was the owner of the property in front of whose premises this excavation was allowed to be exposed.

The question for you to consider is simply whether the city neglected its duty in making and maintaining a safe, suitable sidewalk for persons walking along the same and sufficiently protecting all holes or traps through which a person might accident-ly or innocently fall; and if it did not so its duty in this respect it is liable, regardless of the ownership of the property in front of which the defect existed.

Wherefore plaintiff in error prays that said judgments may be reversed and said judgment and verdict may be set aside and a new trial granted herein.

L. C. BURR,
Attorney for Plaintiff in Error.

183 [Endorsed:] Supreme Court of the United States. The City of Lincoln, plaintiff in error, *v.* Margaret J. Power, defendant in error. Assignments of error.

Endorsed on cover: Nebraska C. C. U. S. No. 1200. The City of Lincoln, plaintiff in error, *vs.* Margaret J. Power. Filed June 6, 1891.

SUPREME COURT U. S.
FILED.
MAY 15 1893
JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

No. 505. October Term, 1893

City of Lincoln, Plaintiff in Error,
vs.
Margaret J. Power, Defendant in Error. } Suggestion of Diminution of Record.

Now comes the defendant herein and suggests to the court that the bill of exceptions filed with the petition in error in this case is defective and incomplete in the following particular, to wit, that said bill of exceptions does not contain the Carlisle tables that were introduced in evidence on the trial of this case in the court below, and moves the court for an order making said Carlisle tables a part of said bill of exceptions, for the reason that said Carlisle tables were omitted through an oversight or mistake from the bill of exceptions at the time it was prepared and settled. This motion is supported by the affidavit of Edwin M. Lamb, the stenographer who reported the evidence on the trial of said cause, and to his affidavit is attached a copy of the Carlisle tables that were introduced in evidence; also the certificate of Elmer S. Dundy, judge of the circuit court of the United States for Nebraska; also the affidavit of F. M. Hall, the attorney who tried the case on the part of the defendant herein in the court below; which said affidavits are made a part of this motion.

This defendant therefore prays for an order from this court making said Carlisle tables a part of the bill of exceptions heretofore filed in this case.

T. M. MARQUETT,
Att'y for Def't in Error.

State of Nebraska, } *ss:*
Lancaster County, }

F. M. Hall, being duly sworn, on his oath says that he was the attorney of record for the defendant on the trial of the above-entitled cause in the circuit court of the United States for the district of Nebraska, and that the facts stated in the foregoing suggestion of diminution of the record in this case are true.

F. M. HALL.

Subscribed in my presence and sworn to before me by the said F. M. Hall this 11th day of May, 1893.

[Notarial Seal William B. Kirby, Lancaster County, Nebraska.]

WM. B. KIRBY,
Notary Public.

Supreme Court of the United States, District of Nebraska.

CITY OF LINCOLN, Plaintiff in Error,
vs.
MARGARET J. POWER, Defendant in Error. } Affidavit.

STATE OF NEBRASKA, }
Lancaster County, } ss:

F. M. Hall, being duly sworn, on his oath says that he was the attorney of record that conducted the trial of above-entitled cause on behalf of defendant in error at the time it was tried at the January, 1891, term of the circuit court of the United States for the district of Nebraska, at Lincoln, and affiant is positive that he introduced in evidence on the trial of said cause the Carlile tables for the purpose of showing the expectancy of life of the defendant in error in said case.

F. M. HALL.

Subscribed in my presence and sworn to before me this 22 day of March, 1893.

[Notarial Seal A. G. Greenlee, Lancaster County, Nebraska.]

A. G. GREENLEE,
Notary Public.

Supreme Court of the United States, State of Nebraska.

CITY OF LINCOLN, Plaintiff in Error,
vs.
MARGARET J. POWER, Defendant in Error. } Affidavit.

STATE OF NEBRASKA, }
Lancaster County, } ss:

Edwin M. Lamb, being duly sworn, on his oath says that he was the stenographer and court reporter who reported the evidence in the above-entitled cause at the time it was tried in the circuit court of the United States for the district of Nebraska before Elmer S. Dundy, judge, at the city of Lincoln, at the January, 1891, term of said court; that, as affiant recollects, *that* at the time of the said trial there was introduced in evidence by the attorneys for Margaret J. Power, the defendant in error in above-entitled cause, the Carlisle tables, and that the Carlisle tables so introduced on the trial of said cause were in words and figures as follows, to wit: As shown by Exhibit "A," attached hereto and made a part of this affidavit.

That this affiant extended his notes and wrote out the bill of exceptions in this case at the request of the attorneys for the city of Lincoln, and that if the said Carlisle tables do not appear in said record or bill of exceptions, then they were omitted through mis-

take or oversight, and should therefore appear in said bill of exceptions as a part of the evidence introduced by the defendant in error herein on the trial of said cause.

EDWIN M. LAMB.

Subscribed in my presence and sworn to before me by the said Edwin M. Lamb this 20th day of March, 1893.

[Notarial Seal S. G. Dorr, Lancaster County, Nebraska.]

S. G. DORR,
Notary Public.

EXHIBIT A.

Carlisle Table of Expectation of Life.

Age.	Prospect of life.	Age.	Prospect of life.	Age.	Prospect of life.	Age.	Prospect of life.	Age.	Prospect of life.	Age.	Prospect of life.	Age.	Prospect of life.	Age.	Prospect of life.
0	38.72	13	46.51	26	37.14	39	28 29	52	19.68	65	11.79	78	6.12	91	3.26
1	44.68	14	45.75	27	36.41	40	27.61	53	18.97	66	11.27	79	5.80	92	3.37
2	47.55	15	45.00	28	35.69	41	26.97	54	18.28	67	10.75	80	5.51	93	3.48
3	49.82	16	44.27	29	35.00	42	26.34	55	17.58	68	10.23	81	5.21	94	3.53
4	50.76	17	43.57	30	34.34	43	25.71	56	16.89	69	9.70	82	4.93	95	3 53
5	51.25	18	42.87	31	33.69	44	25.09	57	16 21	70	9.18	83	4.65	96	3.46
6	51.17	19	42.17	32	33.03	45	24.46	58	15.55	71	8.65	84	4.-9	97	3.28
7	5 .80	20	41.46	33	32.36	46	23.82	59	14.92	72	8.16	85	4.12	98	3.07
8	50.24	21	40.75	34	31.68	47	23.17	60	14.34	73	7.72	86	3.90	99	2.77
9	49.57	22	40.04	35	31.00	48	22 50	61	13.82	74	7.33	87	3.71	100	2 28
10	48.82	23	39.31	36	30.32	49	21.81	62	13.31	75	7.01	88	3.59	101	1.79
11	48.04	24	38.59	37	29.64	50	21.11	63	12.81	76	6.69	89	3.47	102	1.30
12	47.27	25	37.86	38	28.96	51	20.39	64	12.30	77	6.40	90	3.28	103	0.83

In the Circuit Court of the United States, District of Nebraska.

MARGARET J. POWER, Plaintiff,
vs.
THE CITY OF LINCOLN, Defendant.

STATE OF NEBRASKA, *Douglas County,* } *ss:*

I, Elmer S. Dundy, hereby certify that the above-entitled cause of action was tried before me, sitting as a judge of the circuit court of the United States for the district of Nebraska, at Lincoln, at the January, 1891, term of said court, and that on the trial of said case the Carlyle tables were introduced in evidence by the plaintiff's attorneys. This fact I remember very well, and the Carlyle tables that were used will be found on page 439 of Maxwell's Justice Practice; that when said bill of exceptions was presented to me for allowance I overlooked the fact that the Carlyle tables were not made a part of the said bill of exceptions, and there was a mistake in my certificate wherein I certified that said bill of exceptions contained all of the testimony introduced by the plaintiff

and the defendant on the hearing of said cause, said Carlyle tables having been omitted through an oversight or mistake.

25 April, 1893.

ELMER S. DUNDY,
District Judge of the United States for Nebraska.

[Endorsed:] Case No. 14,674. Supreme Court U. S., October term, 1893. Term No., 505. The City of Lincoln, P. E., *vs.* Margaret J. Power. Motion to amend bill of exceptions, & affidavit. Filed May 15, 1893.

M84

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

THE CITY OF LINCOLN,
Plaintiff in Error,
vs.
MARGARET J. POWER,
Defendant in Error.
} No. 1200.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR.

LIONEL C. BURR,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States

THE CITY OF LINCOLN,
Plaintiff in Error,
vs. } No. 1200.
MARGARET J. POWER,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR.

LIONEL C. BURR,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States

THE CITY OF LINCOLN,
Plaintiff in Error,
vs.
MARGARET J. POWER,
Defendant in Error.
} No. 1200.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR.

The defendant in error, Margaret J. Power, brought suit in the Circuit Court of the United States for the District of Nebraska, against the plaintiff in error, The City of Lincoln, to recover damages for personal injuries alleged to have been caused by a defective sidewalk in said city. The petition in the Circuit Court was filed October 10th, 1890, and alleges among other things, that the defendant in error was injured May 31st, 1889, by stepping into a dangerous hole in the

sidewalk which the City of Lincoln had carelessly and negligently permitted and allowed to be and remain uncovered, and unprotected; that the dangerous hole in the sidewalk had existed a long time prior to the accident, and the city had ample notice thereof, but carelessly and negligently failed and refused to repair, cover and protect the same.

The answer denies that the sidewalk was in a dangerous condition, denies that the city had notice either actual or constructive of the dangerous condition of the sidewalk prior to the accident and alleges among other things that whatever injuries the defendant in error may have received were caused by her own carelessness and negligence. The cause was tried to a jury on the 19th day of January, 1891, the jury returned a verdict in favor of defendent in error for the sum of $5700, and on the 21st day of January, 1891, the Court overruled a motion for a new trial and rendered judgment on the verdict.

I.

The tone of the oral charge of the Court to the jury was highly prejudicial to the plaintiff in error. If the Judge had said to the jury: I am the champion of this "bright, pretty little lady's"

cause and I exhort you as chivalrous men who should be willing to assist her in an unequal contest with 55,000 people, to follow my leadership and achieve for her a victory that shall be no less signal and renowned than was the victory of David with his sling over the great Goliath, it would scarcely have created greater sympathy for the plaintiff or more prejudice against the defendant, in the minds of the jury, than did the charge which he actually gave. When such language as was used in this charge is spoken by the Judge with great force and impassioned vehemence the inevitable effect is seen in unjust and excessive verdicts.

It was not, as stated, a contest between a woman and "55,000 good, wise, prosperous and virtuous people." It was a contest between Margaret J. Power and the City of Lincoln, a municipal corporation, a fact which of itself told powerfully in her favor. For this reason, outside the merits of the case, she held the vantage ground, and to insure a fair verdict it was the duty of the Court to hold the scales of justice even with a strong and steady hand. Instead of this the language and tone of the charge were calculated to and must have unduly inflamed the minds of the jury, which naturally in such a case, were already

predisposed in her favor, with sympathy for the plaintiff. This oral charge is to be found on pages from 9 to 12 and 105 to 109, inclusive, of the record, and to it the attention of the Court is respectfully called. A perusal of it will show that the probability is strong that to it is attributable in no small degree the excessive damages found by the jury.

That part of the charge on page 12, of the record, in regard to the city having actual notice of the dangerous hole in the sidewalk, states the fact of notice much stronger than the evidence will justify. All testimony in regard to actual notice is to be found on pages 92, 93, 94 and 95. The policeman, Lewis Otto, swears that prior to the accident he found the grate that covered the hole three or four times when it was not properly laid over the hole, and that he placed it over the hole; that in the latter part of May he found the grate broken five or six inches from the building; that this was two or three days before the accident; that he then fixed it and thought it was perfectly safe; that on this occasion he noticed the grate "to one side of the hole" and a piece broken off, and he laid it over the sidewalk four or five inches so that it was perfectly safe to walk across unless a person came up to the building and stepped in. On

page 94 this witness swears that only six or eight inches of the grate was broken off and that when he placed the grate over the hole just before the accident the broken place was within five or six inches of the building; that he fixed it so that he thought it was entirely safe. By an inspection of the drawing on page 102 it will be seen that there were steps not more than ten feet apart leading into the building on either side of this grate, and that a line connecting the outer edges of these steps leaves the grate almost wholly inside the line next to the building while the broken part of the grate is within a few inches of the building. The grate itself was about three feet wide, and the fact that six or eight inches of one corner near the building was broken would not prevent the grate, when properly placed, from remaining firmly in its position. It is hardly conceivable, nor is there any testimony to show that the plaintiff, as soon as she passed one of these steps, pressed up to within a few inches of the building and stepped through the broken part of the grate. The conclusion is irresistable that after Officer Otto had properly placed the grate in its position so as to make it safe, some unauthorized person wrongfully removed it from its proper place. The fact then, that one corner of the grate

had been broken had nothing to do with its removal from its position over the hole and therefore was in no way the cause of the accident.

If the exact place where the grate, when in position, was broken was dangerous, yet if it did not cause the accident the plaintiff should not recover by reason of its existence. If the accident was caused by the removal of the grate after it had been placed in its proper position and made safe by the officer, and the officers of the city had no actual notice of the removal of the grate afterwards and prior to the accident, then it is submitted that the city had no actual notice of the dangerous hole which caused the accident prior thereto as stated in the charge of the court. If the grate had never been broken it would have been just as liable as it was in its broken condition to be removed from its position by some vicious or mischievous person.

There were perhaps a thousand other grates in the City which were liable to be removed but it would be unreasonable for that reason to expect the City to detail an officer to stand guard over each one.

On page 12 of the record the Court charges the jury that "if you find for her at all you ought

to find that she is to suffer from this accident twenty-five years" and ought to have damages accordingly. In any event she would only be entitled to damages for that length of time, in case the jury should find that the injury was incurable and was permanent in its character but the sweeping statement is made without limitation. Besides the Carlisle Tables were not introduced in evidence, and in the absence of proof the Court had no right to assume or charge the jury that the plaintiff's prospect of life was twenty-five years. The Tables must speak for themselves when introduced in evidence and it is not competent for the Court any more than for a witness to state the contents of a writing or printing. This was reversible error on the part of the Court.

By reference to an ordinance of the city page 72 of the record, it will be seen that it was lawful for any person to construct and maintain any cellar way, window or door area or entrance to any basement in or through any sidewalk of the City of Lincoln, of no greater width than forty-eight inches from the lot line. She knew of the existence of such cellar way, window and door, areas and entrances to basements in and through the sidewalk, throughout the city, and she is also presumed to know the law on that subject, and

in the face of these facts and of this knowledge, the Court on pages 11 and 107 of the record instructed the jury as follows:

> "It occurs to me when a sidewalk is twenty feet wide, or more or less, it is just as proper to use one part as the other. When a city prescribes a sidewalk and requires it to be built according to regulations certainly everybody has a right to use the whole walk. When it is all open it seems to me that the public has a right to use the whole of the sidewalk as well as any part."

We submit that if the plaintiff walked within the forty-eight inch space next to the lot line the law required of her greater care and prudence than when she walked at a greater distance from it, and that therefore the above instruction was erroneous. The defendant asked for an instruction on this point which is to be found on page 114 of the record and was refused by the court. This was error.

II.

The court erred in giving instructions numbered 1, 2, 4 and 5, asked for by plaintiff.

These instructions are to be found on pages 109 and 110 of the record.

The first instruction reads as follows:

> "1. The jury are instructed that the streets and sidewalks in the City of Lincoln, including the place where the accident is alleged to have happened, were under the absolute control of the City of Lincoln, through its officers and agents, and that it was the duty of said city to keep the sidewalks in question in a safe and suitable condition for people traveling on foot, and for this purpose it was the duty of said city and its officers to keep the said sidewalk free from obstructions and not allow any hole or break in the sidewalk by which a person might be hurt to be left uncovered or open so that an accident might happen; and if the city and its officers did not observe this rule of law, and that by reason of such failure the plaintiff was injured without fault on her part, then the city is liable in damages for the injury thus sustained."

This instruction makes the city the insurer of the absolute safety of its sidewalks, and makes it liable in damages for injuries caused by reason of any defect therein, regardless of the question of negligence. This is not the law, which is too well settled on this point to require the citation

of authorities. A municipal corporation is bound to exercise reasonable care and diligence in keeping its sidewalks in repair and in a good and safe condition for travel and is only liable for negligence in failing to keep them in such condition.

The second instruction reads as follows:

"2. If the jury find in this case that the hole or excavation in the sidewalk where the plaintiff claims to have been injured was by any one or for any reason left open so that the same was dangerous to people passing along the sidewalk and you further find that one or more of the police officers of said city was notified of the condition and danger of this place before this accident happened, then you are instructed that it was the duty of the city to immediately place such a protection over or around said hole as would make it safe and do away with the danger to people in walking along said sidewalk, and if the city through its officers neglected to repair the defect or cover or protect this hole after it knew of its unsafe condition, and the injury resulted to this plaintiff, as heretofore stated, then she is entitled to recover from the city the full

amount of damage which in your judgment she has sustained or will sustain on account of said injury."

This instruction ignores the fact that the policeman who discovered the dangerous hole replaced the grate, which had been removed, over it and left it in a safe condition. This was done shortly before the accident and there is no testimony that this policeman or any officer of the City had notice or knowledge after this and prior to the accident that the grate had been removed and of the existence of the dangerous hole. It has already been shown that the plaintiff could not have stepped through the broken part of the grate which was within a few inches of the building, and the fact that the grate was broken could in no way have caused or contributed to the accident. If the policeman did have knowledge that one corner of the grate was broken, yet, if the accident was not caused by reason of that fact but was caused by the removal of the grate by some unauthorized person after the policeman had placed it over the hole in a safe condition and if such policeman nor any other officer of the City had no knowledge of the removal of the grate prior to the accident, and if sufficient time since the removal of the grate and before the

accident had not elapsed to give the City constructive notice of the existence of the hole after the removal of the grate then the City was not liable for the accident. There is no pretence that any officers of the City had notice of the removal of the grate and of the existance of the hole caused by its removal after the policeman had replaced the grate over the hole and left it in a safe condition. That the hole through which plaintiff fell and was thereby injured was made by the removal of the grate after the policeman had fixed it and left it in a safe condition, there can be no doubt, as an examination of the drawing on page 102 and 103 of the record and the testimony of Otto on pages 92-95 will fully show. This grate weighed 150 pounds and when in position would not tip up or move when stepped on. Its surface was even with the sidewalk and it could not get out of place except when purposely removed. This instruction assumes, contrary to the testimony, that the policeman did not replace the grate and leave it in a safe condition.

III.

The Court erred in refusing to give instructions numbered 7, 9, and 12, asked by the defendant.

These instructions are to be found on pages 7 and 8, of the record.

If the plaintiff was injured while walking within the space of forty-eight inches from the lot line where there were cellar and area ways and entrances to basements in and through the sidewalk and when under the ordinances of the City they had the right to be, it was certainly the duty of and the law required the plaintiff to exercise more care and caution and diligence than when walking at a greater distance from the lot line. She was not a stranger in the City but was residing in it and had been accustomed to walk its streets and must therefore have seen these and other cellar and area ways and entrances to basements in and through the sidewalks, and when she walked near them she was bound to exercise more care because there was more liability to danger and accident. Instruction seven properly stated the law applicable to this state of facts and should have been given.

It is submitted that instructions nine and twelve to be found on page eight correctly state the law and should likewise have been given.

IV.

The defendant in its answer avers that whatever injury the plaintiff received was the result of her own carelessness and negligence.

There was evidence tending to show that the plaintiff was guilty of negligence which contributed to her injuries.

It should have been submitted to the jury whether or not she was guilty of negligence in walking so near to cellar and area ways and entrances to basements without exercising due care and caution, and whether such negligence contributed directly to the injuries (pp. 21-23.)

The court gave no instruction to meet this phase of the case.

Again there was evidence tending to show that plaintiff's injuries were aggravated at least by her own carelessness in failing to follow the directions of her physicians and by her imprudence in using the foot too soon and too constantly after it was injured. If the plaintiff aggravated her injury by her own carelessness and negligence she should not recover of the defendant for her pain and suffering or for any disability caused thereby. But the court failed to give any instruction on this head.

The plaintiff was injured Friday, May 31st, 1889, and on Monday following she resumed her work at Mrs. Gosper's (p. 25).

Dr. Hart swears (p. 63) that it was not advisable for her under the circumstances to go to work in two or three days after the injury; that she needed absolute rest; that exercise might result in permanent injury (p. 64), that for treatment he prescribed rest.

Dr. Mitchell, on page 68, says that such an injury by irritation may become chronic.

Dr. Beachly, on pages 73 and 74, testifies that he examined the injured foot; that the foot if kept quiet and properly treated would get well in about six weeks; that if the foot had had the proper care and rest it would be well (pp. 74-75).

Dr. Everett says rest should have been large feature in the treatment, that is putting the foot in absolute rest so that there could be no motion whatever (pp. 80-81).

Dr. Jones, on page 85, says the proper treatment was absolute rest; that riding in a buggy or walking to the store would be a great damage, a great injury.

It appears from the plaintiff's testimony and from the testimony of Mrs. Gosper and others that within a day or two after the injury she resumed her work in the store, and continued to

work as usual. There can be no doubt under the testimony that the plaintiff owes much of the injury to her foot to her own carelessness in failing to follow the directions of her physician; that she was advised to give her foot absolute rest and quiet; that instead of doing so she kept it in a state of constant irritation by riding and walking and in various other ways. It is clear that a very large per cent, at least, if not all, of the damages she has recovered were caused by her own negligence.

V.

The verdict was excessive and must have been given under the influence of passion and prejudice.

The jury returned a verdict for $5700.

The plaintiff at the time of the accident was forty-three years of age. She was a clerk in a millinery store and was earning a salary of $20 per week (p. 18). She was injured on Friday, May 31st, 1889, and on the following Monday she resumed her work and continued it as usual to the time of trial. She received the same salary after as before the injury except a reduction of $2 a week for two weeks (p. 26). Dr. Hart who was the attending physician and surgeon testifies

that the injury consisted of a severe straining of the ligaments and muscles of the foot, that it was a severe sprain (p. 62).

Dr. Mitchell, on page 68 testifies that while the foot may not fully recover it will recover partially so as to be practically a good foot.

Dr. Beachly, on page 74, says that with proper care and treatment the foot ought to have been well at time of trial; that there was no fracture of the bones of the foot, and on page 75 that in his opinion injury was not such that with proper treatment it would be permanent; it ought to have got well in six weeks or two months.

Dr. Everett testifies on pages 80 and 82 that it was a pretty bad sprain and that absolute rest was needed.

Dr. Jones, on pages 84 and 85, says that absolute rest was most needed—stay in the house—that any treatment without perfect rest would amount to very little.

The plaintiff used a crutch less than one year (p. 17). She used the injured foot or at least kept it in motion so as to irritate the injured part almost constantly.

It appears from the testimony of Sharp and

Bowerman (pp. 95-102) that she walked on this foot a great deal and with an almost imperceptible limp. It may be true that the injured foot may never become quite as sound as it was before the injury and that may be said of any injured limb. But this foot will become practically a good, sound foot. It was only a severe strain of the ligaments and muscles in the first place, no bones were broken, and the testimony of all the physicians who examined it is that there is no reason why with proper care the injured foot should not become practically as sound and useful as it was before the injury.

In view of these facts it is submitted that the verdict of $5,700, is exorbitant and excessive and must have been rendered through passion and prejudice. Very few verdicts reach that sum when there has been an entire loss of the limb. This injury no doubt has caused some pain, but it has scarcely impaired her power to earn money. The probability is that by the time the cause is submitted to the court the injured foot will be practically well and as useful as the other.

VI.

The court erred in giving oral instead of written instructions to the jury, which were duly

excepted to. (8, 115) The Statutes of Nebraska require instructions of the court to the jury to be in writing, "unless the so giving of the same is waived by counsel in the case in open court and so entered in the record of said case."

Compiled Statutes of 1889, Page 389. Sec. 52.

And by section 56 of the same statute it is provided that any instruction or charge or any portion of a charge or instructions given to the jury by the court and not reduced to writing shall be error in the trial of the case and sufficient cause for the reversal of the judgment rendered therein. The Revised Statutes of the United States provide that the practice pleadings and forms and modes of proceeding in civil cases, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be to the practice, pleading and mode of proceeding existing at the time in like causes in courts of record of the state within which such circuit or district courts are held; any rule of court to the contrary notwithstanding.

Revised Statutes, Page 174, Section 914

Under repeated decisions of this court the instructions of the court in the case at bar should have been in writing in conformity with the

Statutes of Nebraska, and the giving of oral instructions was reversible error.

Roberts vs. Lewis (*144 U. S., 653*).

Chemung Canal Bank vs. Lowery (*93 U. S., 72.*)

Glenn vs. Summer (*132 U. S., 152*)

Central Transportation Co. vs. Pullman Car Co. (*139 U. S., 24, 39, 40*).

For these many reasons the judgment of the Circuit Court should be reversed and a new trial granted.

LIONEL C. BURR,
Attorney for Plaintiff in Error.

SEP 23 1897
JAMES. H. McKENNEY,

IN THE

Supreme Court of the United States.

No. [redacted]. 505

THE CITY OF LINCOLN,
Plaintiff in Error,

v.

MARGARET J. POWER,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

T. M. MARQUETT,
Attorney for Defendant in Error.

STATE JOURNAL CO., PRINTERS AND STATIONERS, LINCOLN, NEB.

In the Supreme Court of the United States.

THE CITY OF LINCOLN,
Plaintiff in Error,
v.
MARGARET J. POWER,
Defendant in Error.

No. 1200.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF OF DEFENDANT IN ERROR.

This action was commenced in the circuit court of the United States for the district of Nebraska by the defendant in error herein against the plaintiff in error on October 10, 1890, to recover damages for a personal injury sustained by the defendant in error on May 31, 1889, by stepping into a hole in the sidewalk in the city of Lincoln, on the east side of the north half of lot one (1), block forty-one (41), on Twelfth street, the hole in the sidewalk being the areaway cut in the sidewalk next to the building for the purpose of letting light into the basement under the building, the defendant in error claiming that by reason of said accident she had been seriously, dangerously, and permanently injured in the sum of $10,200.

The cause was tried at the January, 1891, term of the United States circuit court for the district of Nebraska, at

Lincoln, Nebraska, and a verdict was returned by the jury in favor of the defendant in error, and against the plaintiff in error, for the sum of $5,700, and judgment was afterwards rendered upon said verdict for said amount, and the case is brought to this court by the city of Lincoln as plaintiff in error.

It is claimed by the plaintiff in error in its brief that the oral charge of the court was highly prejudicial to the case of the plaintiff in error. We think the instructions of the court given on his own motion was a fair presentation of the case to the jury, and was not calculated to in any way prejudice the plaintiff in error.

Counsel for plaintiff in error, on pages 6 and 7 of their brief, have misstated a part of the instructions of the court. They say that the court charged as follows:

"If you find for her at all you ought to find *that she is* to suffer from the accident twenty-five years, and ought to have damages accordingly."

This is not a correct quotation of the instructions of the court. This is the manner in which the instruction is set out by the plaintiff in error in its motion for a new trial, and also the manner in which it is set forth in the assignment of error by plaintiff in error, each of which are incorrect.

On page 105 of the printed record in this case, about the middle of the page, commence the oral instructions given by the court, and on page 109 is found the alleged error in the instruction complained of by the plaintiff in error.

Instead of that instruction reading as the plaintiff in error has set forth in his brief it reads as follows:

"If you find for her at all you ought to find that *if* she is to suffer from this accident twenty-five years, she ought to have more damages than if she is to suffer one year."

The court will plainly see the difference in the phraseology of this instruction as it was actually given by the court and as set forth in the plaintiff in error's brief.

In the instruction as it was actually given it is noticed that the court says "that *if* they find for her at all," "that *if* she is to suffer," etc., while the attorney for plaintiff in error as he sets forth the instruction would show that the court instructs the jury that she is actually to suffer twenty-five years.

We think the instruction as given by the court on its own motion and its effect upon the jury is very different from what plaintiff claims it was upon page 2 of his brief.

Another discrepancy between the instructions of the court as set forth by plaintiff in its motion for a new trial, and in the assignments of error, and in the instructions as really given by the court is this:

On page 9 of the printed record in this case commence the oral instructions of the court as set out by the plaintiff in error in its motion for a new trial; and the instructions of the court in this motion for a new trial are made to read as follows:

"If the plaintiff comes armed with the sling and sword of truth to fight her battle, the might and power of the world *could* not prevail against her."

What the court actually said in his instructions on page 105 of the record was as follows:

"If, however, the plaintiff comes armed with the sling and sword of truth to fight her battle, then the might and power of the world *ought* not to prevail against her.

These are only some of the defects in the instructions as actually given by the court, and as they are quoted by plaintiff in its motion for a new trial, and in its assignments of error and in its brief, and from this it will be seen that the court cannot with any degree of safety rely upon the instructions of the court as found in plaintiff in error's motion for a new trial, assignments of error, and brief, owing to the numerous errors, hence the only safe way to determine whether or not there is any error in the instructions is to read the instructions as given by the court on its own motion, commencing on page 105 of the printed record in this case.

II.

The next error complained of by the plaintiff in error in his brief is, "That there was no actual notice to the city of the defective condition of the sidewalk where the injury is alleged to have occurred."

We desire to call the court's attention to the testimony of Louis Otto, page 92 of the printed record. Louis Otto, it will be remembered, was the witness of the plaintiff in error, and was one of the city's policemen.

"Q. Did you know about the defective or unsafe condition of an areaway, or hole, or iron grate in front of the Jones Block in May, 1889?

"A. I found a grate, three or four times, was not properly laid, or laid on carelessly, and I moved it on again as good as I could; being in the night, I moved it as good as I could"

This witness went onto his beat, as a policeman of the city of Lincoln, where this injury occurred about the 24th or 25th of May, 1889. This injury occurred on the night of the 31st of May, 1889.

The defective condition in the walk was not simply that the grate was taken off of the areaway, but that it was broken, as will be seen by the plat attached to the record herein; and it was broken in such a way that it could not be kept in its place. There was nothing under it to support it after it was broken, and it was placed over the areaway in such a manner that any one stepping upon it, it would tip down into the hole, so then it was the most dangerous kind of a man trap.

It looked safe, to look at it, when as a matter of fact it was a dead-fall, and was much more dangerous to people passing along the street when over the areaway than if it had been taken away altogether, for the reason of its being broken in such a way as to render it impossible to be kept in its position, and the city knew, through its policeman, Louis Otto, that this grate was broken, and could not be kept in its place several days prior to the accident.

On page 94 this witness is asked this question:

"Q. What is it that holds the grate up?

"A. As near as I could find a double floor or a lower floor extends three-fourths of an inch or more out, and makes a base for it to rest on.

"Q. Now, Mr. Otto, how much of that grate was broken off?

"A. Probably six or eight inches; I could 'not tell very well, it was night.

"Q. Then you laid it (the grate) back there over the hole

in the sidewalk so that if a person should get over far enough it would tip down.

"A. Have to get pretty close to the building.

"Q. How close?

"A. Within five or six inches of the building.

"Q. Anything to hold it up next the building?

"A. No, sir.

"Q. The grate was of such a shape that if it was broken you could not put that broken piece so it would stay?

"A. I placed just what was placed over the hole.

The witness went onto this beat the 24th or 25th of May, and his evidence shows that he discovered this broken grate the 26th or 27th of May, thus showing that the grate was left in its broken and unsafe condition at least four or five days, and that the city had notice of the dangerous condition of this stairway for four or five days.

It could have fixed this sidewalk and rendered it safe within a few hours after it had notice, as well as it could within a few days or weeks; to fix it was a very simple matter. Besides the testimony of other witnesses was to the effect that this grate had been broken for many days.

On page 82 Dr. M. E. Jones, the owner of the building in front of which this accident happened, says as follows:

"About a week before the accident I saw this grate down in the hole and I was alarmed."

On page 83 the same witness says: "It is a very heavy grate, such as they all are along that sidewalk; all the same kind and in accordance with the requirements of the

city. I replaced it and thought no more about it. In about a week afterwards I received a little notice asking me to come over to the store, something he wanted to tell me about; saw the same thing existed again; it was broken.

"Q. How much was broken off?
"A. About one-third.

"Q. What is its shape?
"A. Semi-circular."

Rehlaender says on page 31 that this grate was removed from the areaway, and was lying on the sidewalk part of the time and part of the time lying down in the areaway for two or three weeks, ten days or two weeks, prior to this accident.

Mrs. Gosper states the same thing, so does Miss Harmon, so do Mrs. Davis and Miss Dowden and several other witnesses, so that there can be no possible question but that this defective sidewalk had been in the dangerous condition for several days, and that the city had actual and absolute notice of its dangerous condition for at least three or four days prior to the accident, so that the claim of the plaintiff in error that the city had no actual notice of the fact that the iron grate in this areaway was broken, does not seem to be very well founded, and is not borne out by the evidence in the case, when the city's own witness settles any and all possible question relative to the question of notice to the city.

It is claimed by the plaintiff in error in its brief that Officer Otto properly placed the grate in its position so as to make it safe, and that some unauthorized person wrongfully removed it from its proper place.

The fact is, that after the grate was broken it could not be

set in its position in such a way as to make it safe, for the reason that there was nothing to support the framework of the grate after the corner of it had been broken off.

It was the business of the city, after it ascertained the condition of this areaway and the grate, to fix it in such a manner that it could not fall down into the areaway, or be easily removed. To argue any other way is to say that a broken grate is just as good as one that is not broken.

It is claimed by the plaintiff in error that neither the defendant, nor any other foot passenger, ought to be permitted to walk within forty-eight inches of a building, and that they should not be permitted to use that part of the sidewalk, and if they do and are injured they ought not to recover.

This is a new and startling doctrine, and we are perfectly willing that counsel for plaintiff in error shall have whatever honor there is in this original idea.

The court's instruction which they complain of, it seems to us, clearly sets forth the law in regard to this matter, and that is that persons walking along a sidewalk have just as much right to use one part of that thoroughfare as another part.

The ordinances of the city of Lincoln prescribe the manner in which the areaway shall be built, and that they shall be perfectly safe. If that is done, then a passenger can walk over it with as much impunity as he can over any other part of the sidewalk.

The law presumes that these areaways shall not only be constructed in that condition, but be kept in that condition for the use and benefit of the passengers that travel over the streets of the city.

The instruction complained of by the plaintiff in error on page 9 simply follows the rule laid down by the supreme court of the state of Nebraska, as follows:

"A person traveling in the public street, if he exercises ordinary care, has a right to be absolutely safe against all accidents arising from obstructions or imperfections in the street."

City of Lincoln v. Walker, 18 Neb., 244.

"A city is required to use all reasonable care and supervision to keep its streets and sidewalks in a reasonably safe condition for travel in the ordinary ways of travel, and if it fail to do so, it is liable for injuries sustained in consequence of such failure, providing the party injured was exercising reasonable care."

City of Lincoln v. Smith, 28 Neb., 762.

"To render a municipal corporation liable for injuries caused by defective sidewalks it is not necessary that it should have actual notice of the defect. If a state of facts exist, such that ignorance could only arise from a failure to exercise reasonable official care, notice will be presumed."

City of Lincoln v. Smith, 28 Neb., 762.

There were certain ordinances of the city of Lincoln introduced on the trial of this case, and are found commencing on page 71 of the printed record. It will be seen from these ordinances that it is made the duty of a policeman to take note of all defects in sidewalks, and when out of repair notify the owners or occupants of the premises and report the same to the inspector of sidewalks.

It will also be noticed that by ordinance 1090, page 72, of the printed record, it is provided that windows opening through the sidewalk adjacent to buildings, and where it is necessary to admit light and air to the basement, shall be protected and covered by strong iron gratings, and so constructed that the same *may be walked upon with safety;* and of sufficient strength to hold any weight that should come upon the sidewalk at that point.

Now in this case what was the plain duty of Policeman Otto when he discovered the iron grating was broken? It was his bounden duty as an officer to report the same to the city of Lincoln that it might be fixed; and it is no defense for the plaintiff in error to say that the grate might have been removed from the opening and the accident happen even if the grate had not been broken.

The facts in this case show that the accident happened because the grate was broken in such a manner that it could not be kept in its place.

We submit that it is not easy to find a case where injuries of this kind occur, where the proof is more positive or convincing as to the dangerous condition of the sidewalk, and actual notice of the municipality of such danger, than in this case.

If the policemen of the city of Lincoln knew of the defective condition of the sidewalk complained of in this case, this was notice to the city, and the city is bound by it.

Dewey v. City of Detroit, 15 Mich., 306.
Bloomington v. Bey, 42 Ill., 503.
Colby v. City of Beaver Dam, 34 Wis., 285.
Goodenough v. City of Oshkosh, 24 Wis., 549.
Clemence v. City of Auburn, 66 N. Y., 334.

It is claimed that the damages in this case are excessive, and that the plaintiff recovered a greater amount of damages than she had actually sustained.

The evidence shows that the plaintiff in error was forty-three years old; that she was a milliner, engaged in the establishment of Mrs. Gosper, in the city of Lincoln, as a trimmer at the time of the injury, and was earning $20 a week, and had been earning that amount of money for more than six years.

That this injury occurred on the 31st day of May, 1889; that her engagement with Mrs. Gosper did not end until the 1st day of July, 1889; the injury occurred on Friday, and on Monday morning she went to Mrs. Gosper's, being taken there in a buggy and taken home in a buggy, and carried on her work as trimmer, not, however, using her injured foot in any way whatever, neither walking on it in going to and from the store, nor after she got to the store.

That after she left Mrs. Gosper's, about the first of July, she did no work of any kind whatever during the rest of 1889 and 1890, until the month of September, 1890, being a space of fourteen months; that she was laid up from the injuries received by reason of her stepping into this hole in the sidewalk, and that she continued to walk with crutches until March, 1890. (See page 17 of the printed record.)

That in September she went to work for D. B. Fiske & Co., having at that time to walk with a cane, riding to and from her place of business upon the street cars, and sitting down all the time that she was in the store of Fiske & Co., having all the materials brought to her by other people, for the reason that she was unable to use her foot in walking around.

The evidence shows that she was under the care of Dr. Green, a physician of Dubuque, Iowa, until September, 1890.

The evidence of the defendent in error shows that this injury has had a telling effect upon her general health, and that she has suffered almost continually from the time she received the injury up to the trial of this case in January, 1891, and at that time was unable to walk without the assistance of a cane, having lost pretty much all the use of the front part of her foot.

It is claimed by the plaintiff in error that the defendant in error contributed to her own injury by reason of attempting to go to work too soon after she received the injury.

There is no foundation for this claim; the evidence of Dr. Hart and Dr. Mitchell were both to the effect that it was better for the defendant in error to be employed in some way or other if she could be thus employed without using the injured foot.

It is conceded by the plaintiff in error that the injury in this case was a severe one and quite serious, and they attempt to evade their liability by a claim that the defendant aggravated the injury by using her foot earlier than she ought to have done.

Dr. Hart, her attending physician, and Dr. Mitchell, who examined her foot at the time of the trial, and who examined it in 1889, were both of the opinion that this injury was a permanent one, and that the defendant in error would never entirely recover the use of her foot, and that it was possible that she might lose her foot.

All of the physicians agree that a sprain of the foot at the place where the foot of the defendant in error was

injured was a very serious matter, much more serious than a fracture, and much less liable to recover.

The Carlisle tables that were introduced in evidence in this case show that the defendant in error's expectancy in life was about twenty-five years. In view of this fact and of the defendant in error's ability to earn money, and of the pain and suffering that she had undergone, and of the strong probabilities that the injury was a permanent one, we submit to the court that the judgment of $5,700 was not excessive.

The witnesses were all before the jury, as well as the defendant in error. All of the facts were submitted to them, and they were the most competent judges as to the seriousness of the injury and the amount that the defendant in error ought to recover, and we do not think that the plaintiff in error has shown any reasons of any kind whatever for in any way disturbing the judgment rendered by the lower court.

The sixth and last error complained of by the plaintiff in error in its brief is, that the court erred in giving oral instead of written instructions to the jury.

This, it is claimed, was error on the part of the trial court, for the reason that the statutes of Nebraska require the instructions of the court to the jury to be in writing, unless the so giving of the same is waived by counsel in open court, and so entered on the records of said case.

While the giving of oral instructions on a trial in the state court under the code of Nebraska would have been error, this provision of the statute has no application to the trial or proceedings on the trial of a case in the circuit court of the United States, and that the provision of the Revised Statutes of the United States which provides that the practice, pleadings, forms, and modes of proceeding in civil cases shall

conform as near as may be to the practice, pleading, and mode of proceeding existing at the time in like cases in the courts of record of the state within which such circuit or district courts are held, has no application to this particular point raised in the plaintiff in error's brief, viz., the manner in which the jury shall be instructed by the trial court.

In the case of Nudd v. Burroughs, 91 U. S., 426, the court says:

"The state statutes require the judge to instruct the jury only as to the law of a case, and provided that the written instructions of the court should be taken by the jury in their retirement and returned with the verdict, and that papers read in evidence might be carried from the room by the jury."

The court charged the jury upon the facts, and refused to permit them to take to their room the written instructions given by the court or papers read in evidence. This court held that this was not error, because the personal conduct and administration of the judge in the discharge of his authority was not practice, or pleading, or the form or mode of proceeding within the meaning of the terms used in the act of congress. See, also,

R. R. Co. v. Horst, 93 U. S., 291.
Newcomb v. Wood, 97 U. S., 581.
Lamaster v. Keeler, 123 U. S., 376.
Foster's Federal Practice, 556.
Chataugay in Rel Ore & Iron Co., Sup. Court Reptr., vol. 9, Nos. 7 and 8, page 150.

The plaintiffs in error cite no authority of the supreme court of the United States in support of their proposition, that the giving of oral instead of written instructions is reversible error; on the contrary, this court has held in a number of cases that the giving of oral instead of written in-

structions by the trial judge in the circuit court of the United States is not error, simply because a different method is prescribed by the state statutes in the said courts.

Counsel for plaintiff state in their brief that the Carlisle tables were not introduced in evidence. In this, we think they are mistaken. The Carlisle tables were introduced in evidence, but they seem to have been omitted from the bill of exceptions.

We have filed a motion suggesting a diminution of the record and asking that the Carlisle tables as introduced be supplied, and we have also filed a copy of the Carlisle tables as introduced, together with the affidavit of the stenographer who took the evidence and wrote out the bill of exceptions, also a certificate of Judge Dundy, before whom the case was tried, to the effect that the Carlisle tables were introduced in evidence and that through a mistake or oversight on the part of the judge the bill of exceptions was certified to by him without discovering the omission of the Carlisle tables; and there have been no counter-affidavits made or showing of any kind on the part of counsel for complainant in any way, so we think they virtually concede the Carlisle tables were introduced in evidence on the trial of the case.

But in any event, and without conceding that they were not introduced in evidence, we think it makes no difference. The court can take judicial notice of the Carlisle tables whether they were introduced in evidence or not.

Willard v. Ames, 30 N. E. Reporter, 210.
Gordon v. Tweedy, 49 American Reporter, 813.
McHenry v. Yokum, 27 Ill., 160.
Jackson v. Edwards, 7 Paige's Chancery, 387.

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